Room
SOCIOLOGY & ECONOMICS
DETROIT PUBLIC LIBRARY

Volume 9, No. 19, Pages 4776 to 5221,
September 6 - September 16, 1994

FC 1.12/3:9/19

FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

Reed E. Hundt, Chairman
James H. Quello
Andrew C. Barrett
*Susan Ness
**Rachelle B. Chong

The contents of this document are subject to correction by means of an erratum appearing at a future date in the FCC Record. Users should notify the Secretary of errors so that an erratum can be inserted in a later publication.

The appropriate citation for documents printed in the FCC Record should include the volume number, page number, and year. See 47 C.F.R. Section 1.14. Earlier Commission documents may continue to be cited to the FCC Reports.

Citation Form: 9 FCC Rcd 1 (1994)

*Commissioner Ness sworn in on June 3, 1994.
**Commissioner Chong sworn in on June 6, 1994.

DETROIT PUBLIC LIBRARY
NOV 08 1994
DEPOSITORY DOCUMENT

United States Government Printing Office • Washington, D.C.
For Sale by the Superintendent of Documents U.S. Government Printing Office on a subscription basis

Federal Communications Commission Record

Volume 9
Issue 19

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iii

Table of Docket Numbers..... iv

Table of Rulemakings..... v

Table of Localities..... vi

Table by Subject Matter..... vii

Table by Statutory and Rule Provisions..... ix

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 4776

Table of Cases
Volume 9
Issue 19

Case Name	Page
AT&T	4782
AT&T (ERRATUM)	4888
Alascom, Inc.	4839
Algreg Cellular Engineering	5098
Amendment of Part 1 - Informal Complaints (ERRATUM)	4887
American Telephone and Telegraph Co.	4860
American Telephone and Telegraph Co.	4865
Barden Cablevision	4805
Bell Atlantic Network Services, Inc.	4821
BellSouth Telecommunications, Inc.	4847
CableAmerica Corporation	4886
Cincinnati Bell Telephone Company	4810
Depreciation Rate Prescriptions - Domestic Telephone Carriers	4808
Dianne Feinstein, John Seymour, Thomas Hayes, et.al (ERRATUM)	4889
Electric Plant Board of the City of Glasgow, KY	4855
Expanded Interconnection Local Telephone Company Facilities	5193
Fee Decisions of the Managing Director	4897
Fouce Amusement Enterprises, Inc.	4818
Fouce Amusement Enterprises, Inc.	4878
GTE Service Corporation	4781
Globalcom International, Inc.	4777
Guam Telephone Authority	4890
Hutchens Communications, Inc.	4849
JEM Communications, Inc.	4874
Johnson, Robert	4836
LDDS Metromedia	4896
Local Exchange Carriers' Rates, Terms, and Conditions	4885
MCI Telecommunications Corp.	4776
National Exchange Carrier Association, Inc.	4919
New Personal Communications Services	4957
Niagara Mohawk Power Corporation	4838
Ochoa, Maria M.	4789
Open Network Architecture and Nondiscrimination Safeguards	4922
Pittsburg International Teleport	4780
Playa Del Sol Broadcasters	4840
Rem Malloy Broadcasting	4822
Rochester Telephone Corporation	4820
Scripps Howard Broadcasting Company	4880
Summit Communications, Inc.	4833
Table of Allotments, FM, Addison, AL	4816
Table of Allotments, FM, Bozeman, MT	4798
Table of Allotments, FM, Cleveland, Belzoni and Durant, MS	4791
Table of Allotments, FM, Commerce, OK and Neosho, MO	4800
Table of Allotments, FM, Jefferson City, MO	4799

Case Name	Page
Table of Allotments, FM, Okmulgee, Nowata and Pawhuska, OK	4882
Table of Allotments, FM, Pillager, MN	4797
Table of Allotments, FM, Roseau, MN	4796
Table of Allotments, FM, Tawas City, MI	4794
Tele-Communications, Inc.	4783
TeleScripps Cable Company	4831
US Sprint Communications Company	4801
WCKS Broadcasters, Ltd.	4871
Waiver of the Definition of "Study Area" in Part 36	4811

Federal Communications Commission Record

Table of Cases by Delegated Authority and FCC Number
Volume 9
Issue 19

Delegated Authority or FCC Number	Page
DA 94 - 679	4919
DA 94 - 832	4783
DA 94 - 875	4897
DA 94 - 900	4816
DA 94 - 939	4791
DA 94 - 943	4776
DA 94 - 944	4777
DA 94 - 945	4780
DA 94 - 947	4781
DA 94 - 950	4808
DA 94 - 951	4782
DA 94 - 952	4810
DA 94 - 954	4811
DA 94 - 955	4794
DA 94 - 956	4796
DA 94 - 957	4797
DA 94 - 958	4798
DA 94 - 959	4885
DA 94 - 960	4799
DA 94 - 961	4800
DA 94 - 962	4818
DA 94 - 963	4878
DA 94 - 964	4805
DA 94 - 968	4836
DA 94 - 969	4838
DA 94 - 970	4831
DA 94 - 971	4833
DA 94 - 972	4820
DA 94 - 973	4821
DA 94 - 974	4855
DA 94 - 975	4849
DA 94 - 976	4847
DA 94 - 979	4839
DA 94 - 981	4860
DA 94 - 982	4865
DA 94 - 984	4882
DA 94 - 985	4886
DA 94 - 986	4871
DA 94 - 989	4887
DA 94 - 990	4888
DA 94 - 991	4896
DA 94 - 994	4889
FCC 94 - 58	4922
FCC 94 - 144	4957
FCC 94 - 162	4801
FCC 94 - 190	5154
FCC 94 - 205	4890
FCC 94 - 223	4874
FCC 94 - 231	4880
FCC 94D - 10	4840
FCC 94R - 12	5098
FCC 94R - 13	4789
FCC 94R - 14	4822

Federal Communications Commission Record

Table of Cases by Docket Number
Volume 9
Issue 19

Docket Number				Page
CC	Dkt.No.88	-	2	4821
CC	Dkt.No.91	-	142	5098
CC	Dkt.No.92	-	256	4922
CC	Dkt.No.93	-	162	4885
CC	Dkt.No.94	-	83	4887
GEN	Dkt.No.94	-	314	4957
MM	Dkt.No.88	-	306	4822
MM	Dkt.No.90	-	430	4789
MM	Dkt.No.90	-	504	4840
MM	Dkt.No.92	-	157	4791
MM	Dkt.No.93	-	94	4880
MM	Dkt.No.93	-	228	4794
MM	Dkt.No.93	-	283	4797
MM	Dkt.No.94	-	17	4799
MM	Dkt.No.94	-	24	4798
MM	Dkt.No.94	-	39	4796
MM	Dkt.No.94	-	49	4800
MM	Dkt.No.94	-	98	4816
MM	Dkt.No.94	-	100	4882

Federal Communications Commission Record

Table of Cases by Rulemaking Number
Volume 9
Issue 19

Rulemaking Number	Page
RM - 7140	4957
RM - 7175	4957
RM - 7462	4791
RM - 7618	4957
RM - 8184	4791
RM - 8295	4794
RM - 8374	4797
RM - 8433	4816
RM - 8437	4799
RM - 8440	4798
RM - 8446	4800
RM - 8452	4796
RM - 8509	4882

Table of Cases by City
Volume 9
Issue 19

City/ State	Page
Addison, AL	4816
Baltimore, MD	4880
Belzoni, MS	4791
Bozeman, MT	4798
Cleveland, MS	4791
Commerce, OK	4800
Detroit, MI	4805
Durant, MS	4791
Franklin, AL	5098
Glasgow, KY	4855
Hemet, CA	4836
Jefferson City, MO	4799
Karns, TN	4871
Knoxville, TN	4871
Lenoir, NC	4789
Los Angeles, CA	4889
Mecca, CA	4840
Neosho, MO	4800
Nowata, OK	4882
Okmulgee, OK	4882
Pawhuska, OK	4882
Pillager, MN	4797
Ponce, PR	4874
Raleigh, NC	4822
Roseau, MN	4796
Seattle, WA	4833
Tawas City, MI	4794
Tazewell County, VA	4831

Subject Index
Volume 9
Issue 19

Subject	Page
Broadcast Radio Services - General Rules	
Licenses and permits	
Multiple ownership of broadcast stations in the same	4783, 4874
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	4791, 4794, 4796, 4797, 4798, 4799, 4800, 4882
Broadcasting - TV Stations	
Allocations/assignments/licenses	
Table of assignments	4816
Cable Television Service	
Markets and services	
Cable signals in major markets, provisions for	4818, 4878
Crossownership: limitation on cable company carrying a TV signal	4783
Carriers: Service Altered	
Extensions and supplements	
Applications, contents of	4776, 4777, 4780, 4896, 4860, 4865
Commission Organization	
Delegations of authority - Chief, Common Carrier Bureau	
Limitations on delegated authority	4919
Common Carriers/Affiliates: Reports	
Depreciation rates, reports of proposed changes in	4808
Common Carriers: Miscellaneous Rules	
Enhanced services (computer) and customer-premises equip	4821, 4847
Communications Act of 1934	
Common Carriers	
Extension of lines, certificate for	4776, 4777, 4780, 4860, 4865
Penal provisions; forfeitures	
Rebates and offsets, forfeitures in cases of	4871
Radio, provisions relating to	
Licenses, limitation on holding and transfer of	4783

Subject	Page
Frequency Allocations and Radio Treaty Matters	
Allocation, assignment, and use of radio frequencies	
International and U.S. table of frequency allocations	4957
Practice and Procedure	
Common carriers: complaints	
Formal or informal	4801
Common carriers: complaints, informal	
Procedure	4887
Hearing proceedings: discovery and preservation of evidence	
Discovery, general rules for	4880
Hearing proceedings: review proceedings	
Decision, appeal and review of initial	4789
Information, general	
Rules, suspension, amendment, waiver	4811
Proceedings, miscellaneous	
Forfeiture proceedings	5154
Reconsideration/review of Commission action	
Actions by delegated authority, application for review	4801
Reconsideration of a final FCC action, 4831, 4833, 4805,	4805
Public Mobile Service	
Transfers and assignments of applications	5098
Applications and licenses-filing requirements	
Defective applications	5098
Applications and licenses-processing	
Grants by random selection	5098
Receipt of application	5098
Domestic public cellular radio telecommunications service	
Applications for markets below the top 90, ownership in	5098
Radio Frequency Devices	
Field disturbance sensors	
Typical areas regulated in this subpart: microwave and RF energy	4957

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
000.291 Delegated Authority	4781
000.291 Delegated Authority	4885
001.106 Petition for reconsideration	4833
001.106 Petitions for Reconsideration	4805
001.106 Petitions for Reconsideration	4831
001.115 Appl. for Review; 300.415 Statue of limitations	4801
001.276 Appeal and Review of Initial Decision	4789
001.300 Petition for Waiver for Waiver	4811
001.311 General	4880
001.711 Formal or informal complaints	4801
001.717 Informal Complaints	4887
043.430 Reports of Proposed Changes in Depreciation Rates	4808
061.410(c) Price Cap Rules	4811
063.001 Contents of Application	4780
063.001 Contents of Application	4860
063.001 Contents of Application	4865
063.001 Contents of Applications	4776
063.001 Contents of Applications	4777
063.001 Contents of Applications	4896
064.702 Furnishing of Enhanced Services and Customer Premises Equipment	4821
064.702 Furnishing Of Enhanced Services and Customer Premises Equipment	4847
073.202 FM Table of Allotments	4791
073.202 FM Table of Allotments	4794
073.202 FM Table of Allotments	4796
073.202 FM Table of Allotments	4797
073.202 FM Table of Allotments	4798
073.202 FM Table of Allotments	4799
073.202 FM Table of Allotments	4800
073.202 FM Table of Allotments	4816
073.3555 Multiple ownership	4783
073.3555 Multiple Ownership	4874
076.1000 Competitive Access to Cable Programming	4783
076.1001 Unfair practices generally	4849
076.1002 Specific unfair practices prohibited	4855
076.1002 Specific unfair practices prohibited	4886
076.1301 Prohibited practices	4849
076.501 Cross-ownership	4783
076.503 National subscriber limits	4783
076.504 Limits on carriage of vertically integrated	4783
076.610 Disputes concerning carriage	4818
076.610 DISPUTES CONCERNING CARRIAGE	4878
076.905 Effective Competition	4805
076.905 Standards for effective competition	4831
076.905 Standards for effective competition	4833
076.906 Presumption of no effective compeition	4805
076.906 Presumption of no effective competition	4831
076.906 Presumption of no effective competition	4833
076.910 Franchising authority certification	4805
076.910 Franchising authority certification	4831
076.910 Franchising authority certification	4833

076.911 Petition for reconsideration of certification 4805
076.911 Petition for reconsideration of certification 4833
076.970 Commercial leased access rates 4849
090.621(b) Selection and assignment of frequencies 4836
090.725(f) Construction requirements 4838
300.214 Extension of Lines 4776
300.214 Extension of Lines 4780
300.214 Extension of Lines 4860
300.214 Extension of Lines 4865
300.214 Extension of Lines 4896
300.214 Extension of Lines DA 94-944,8/29/94 4777
300.220 Accounts, Records, Memoranda, Depreciation Charges 4808
300.310 Limitation on Holding and Transfer of Licenses 4783
300.503(b) Forfeitures (Notice of Apparent Liability) 4871
300.532 Cable Channels for Commercial Use 4849
300.533 Ownership Restrictions 4783
300.534 CARRIAGE OF LOCAL COMMERCIAL TELEVISION SIGNAL 4878
300.534 Carriage of Local Commercial Television Signals 4818
300.536 Regulation of Carraige Agreements 4849
300.536 Regulation of Carriage Agreements 4783
300.548 Development of Competition and Diversity in Video 4783
300.548 Development of Competition and Diversity in Video 4849
300.548 Development of Competition and Diversity in Video 4855
300.548 Development of Competition and Diversity in Video 4886
300.623 Regulation of Rates 4805
300.623 Regulation of rates 4831
300.623 Regulation of rates 4833
400.181464 Broadcasting Obscene or Indecent Language 4871
47 C.F.R. § 64.1301 payphone compensation 4782
47 C.F.R. § 64.1301 payphone compensation 4888
47 CFR § 69, Access Charges 4820
500.2170 financial qualifications 4840
500.3170 Financial Qualifications 4822
AAD 93-95; DA 94-954 4811
CC Docket No. 83-1376 RM 4436 AAD 94-119 4839
FCC 94-205; Petition for Declaratory Ruling 4890
MO&O, Guam FGD Equal Access Order 4890
Part 36 Appendix-Glossary Study Area Defin 4811
Petition for reconsideration of certification 4831

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-94-340

Application for authority to acquire and operate facilities via the Pan American Satellite (PAS) system for service between the U.S. and the Dominican Republic.

ORDER AND AUTHORIZATION

Adopted: August 22, 1994; Released: September 6, 1994

By the Chief, International Facilities Division.

1. Upon consideration of the above-captioned uncontested application, filed by MCI Telecommunications Corp. (MCI) pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-340 IS GRANTED and MCI is authorized to:

a. lease and operate 48 64-Kbps equivalent channels between PAS's Homestead, Florida earth station and the PAS-1 satellite, connecting with similar circuits provided by MCI's correspondent in the Dominican Republic;

b. lease and operate any necessary domestic connecting facilities;

c. acquire and operate facilities in the Homestead earth station, to be used in conjunction with the space segment capacity authorized herein; and

d. use said facilities to provide MCI's authorized services, including international switched voice service, between the U.S. and the Dominican Republic.

3. IT IS FURTHER ORDERED that this authorization is subject to Commission jurisdiction over the use of all space segment within the PAS system.

4. IT IS FURTHER ORDERED that neither MCI nor any persons or companies directly or indirectly controlling or controlled by MCI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which MCI or any persons or companies controlling or controlled by MCI are parties.

5. IT IS FURTHER ORDERED that our authorization of MCI to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the Dominican Republic -- that is, private lines which originate in the United States and terminate in the Dominican Republic or which originate in the Dominican Republic and terminate in the United States. In addition, MCI may not -- and MCI's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or the Dominican Republic end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the Dominican Republic affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

6. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement entered into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for any additional circuits it seeks to operate via the PAS-1 satellite.

10. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GLOBALCOM INTERNATIONAL, INC. File No. I-T-C-94-354

Application for authority to lease and operate facilities for provision INTELSAT Business Service and resale of private lines not interconnected with the public switched network.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted:August 22, 1994; Released: September 6, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of INTELSAT Business Service (IBS) and resale of private lines not interconnected with the public switched network to the general public by Globalcom International, Inc. (Globalcom).

2. Accordingly, IT IS ORDERED that Application File No. I-T-C-94-354 IS GRANTED, and Globalcom is authorized to:

a. establish channels of communication between appropriately licensed U.S. earth stations and INTELSAT Atlantic and Pacific Ocean region satellites for the provision of IBS between the U.S. and the points listed in COMSAT's Tariff for the space segment of IBS service;

b. lease from authorized common carriers and operate 30 64-Kbps circuits to each of the points listed in the Appendix hereto;

c. lease and operate any necessary domestic connecting facilities; and

d. use the facilities in b. and c. above to provide private lines, not interconnected with the public switched network, between the U.S. and the points listed in the Appendix hereto.

3. IT IS FURTHER ORDERED that our authorization of Globalcom to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the points listed in the Appendix -- that is, private lines which originate in the United States and terminate in any of the points listed in the Appendix or which originate in any of the points listed in the Appendix and terminate in the United States. In addition, Globalcom may not -- and Globalcom's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign end affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

4. IT IS FURTHER ORDERED that neither Globalcom nor any persons or companies directly or indirectly controlling or controlled by Globalcom, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which Globalcom or any persons or companies controlling or controlled by Globalcom are parties.

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

10. IT IS FURTHER ORDERED that the authority granted herein for Globalcom to establish channels of communication between the earth stations in the U.S. and the INTELSAT satellites does not dispense with the requirement that all such earth stations shall be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites.

11. This authorization is not to be construed as permitting the provision of any services between earth stations located within the U.S.

12. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

APPENDIX

Authorized Private Lines, Not Interconnected with the Public Switched Network (30 64-Kbps circuits to each point)

Antigua
Argentina
Australia
Austria
Bahamas
Barbados
Belgium
Belize
Bermuda
Botswana
Brazil
Cambodia
Canada
Chile
China
Colombia
Costa Rica
Denmark
Dominica
Dominican Republic
Ecuador
Egypt
El Salvador
France
Germany
Greece
Grenada
Guatemala
Guadaloupe
Guinea-Bissau
Guyana
Honduras
Hong Kong
India
Indonesia
Iran
Ireland
Israel
Italy
Ivory Coast
Jamaica
Japan
Jordan
Kenya
Malaysia
Mauritius
Mexico
Mozambique
Netherlands
New Zealand
Nicaragua
Nigeria
Norway
Pakistan
Panama
Peru
Poland
Portugal
Saudi Arabia
Saychelles
Singapore
Somalia
South Africa
South Korea
Spain
St. Lucia
Swaziland
Sweden
Switzerland
Taiwan
Tanzania
Thailand
Trinidad
United Kingdom
Venezuela
Vietnam
Yugoslavia
Zambia
Zimbabwe

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MOBILE SATELLITE COMMUNICATIONS, INC. d/b/a/ PITTSBURGH INTERNATIONAL TELEPORT — File No. I-T-C-94-382

Application for authority to acquire and operate facilities for service between the U.S. and Suriname.

ORDER AUTHORIZATION, AND CERTIFICATE

Adopted: August 22, 1994; Released: September 6, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Suriname by Mobile Satellite Communications, Inc. d/b/a Pittsburgh International Teleport (MSC).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-382 IS GRANTED and MSC is authorized to:

a. lease from Comsat and operate one 512-kbps satellite circuit between an appropriately licensed U.S. earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with a similar circuit between the satellite and an earth station in Suriname furnished by MSC's correspondent in Suriname;

b. lease and operate one 512-kbps circuit in the appropriately licensed U.S. earth station to be used in conjunction with the satellite space segment capacity;

c. lease and operate necessary domestic connecting facilities; and

d. use facilities in a, b, and c above to provide MSC's regularly authorized services between the U.S. and Suriname.

3. IT IS FURTHER ORDERED that our authorization of MSC to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and Suriname -- that is, private lines which originate in the United States and terminate in Suriname or which originate in Suriname and terminate in the United States. In addition, MSC may not -- and MSC's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Suriname end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that Suriname affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Nitice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

4. IT IS FURTHER ORDERED that neither MSC nor any persons or companies directly or indirectly controlling or controlled by MSC, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which MSC or any persons or companies controlling or controlled by MSC are parties.

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 26, 1994

GTE SERVICE CORPORATION SEEKS AUTHORITY TO CONTINUE TO CHARGE PREMIUM RATES IN OFFICES USING ALTERNATE EQUAL ACCESS TECHNOLOGY

Pleading Cycle Established

COMMENTS: September 6, 1994
REPLY COMMENTS: September 13, 1994

On June 30, 1994, GTE Service Corporation (GTE) filed a petition requesting authority to continue to charge premium rates beyond December 31, 1994 in 19 end offices using alternate equal access technology in Iowa and Indiana.

GTE states that it has upgraded its offices using Vidor equipment and is continuing a measured replacement program of other offices using alternate equal access technology. It requests that the Commission extend the waiver to allow use of premium rates in these end offices.

Interested parties may file comments on GTE's petition no later than **September 6, 1994**. Replies should be filed by **September 13, 1994**.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.15(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its offices at 2100 M Sreet, N.W., Suite 140, Washington, D.C. 20037 and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20551.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau, (202) 418-1530.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 30, 1994

AT&T FILES PETITION FOR WAIVER OF THE PER-PHONE COMPENSATION REQUIREMENT FOR PAY TELEPHONES

Comment Date: September 29, 1994
Reply Comments Due: October 13, 1994

AT&T has filed a petition for waiver of Section 64.1301 of the Commission's rules which requires certain interexchange carriers to compensate competitive payphone owners on a per-phone basis for originating interstate access code (10XXX or 1-800) calls. AT&T seeks a waiver of that rule so that it can compensate competitive payphone owners on a per-call basis instead. In support of its waiver request, AT&T notes that the Commission has expressed a strong preference for moving toward a per-call compensation mechanism when it becomes technically feasible.

AT&T contends in its waiver that it will soon be technically possible for it to pay such compensation on a per-call basis for access code calls made from non-presubscribed payphones in equal access areas. AT&T proposes that it or any other similarly positioned operator service provider have the option to pay compensation on a per-call basis. AT&T requests that the Commission establish a compensation rate of $.25 per call for all completed interstate interLATA and international calls.

Parties wishing to comment on this matter may do so no later than **September 29, 1994**. Reply comments may be filed not later than **October 13, 1994**. All filings concerning this matter should refer to ENF 94-3. A copy of this petition for waiver and any subsequent filed documents in this matter may be obtained from the international Transcription Services (ITS), 2100 M Street N.w., Suite 140, Washington, D.C. 20037, (202) 857-3800, and in Room 246 at 1919 M Street, N.W. Washington, D.C. 20554. The petition and documents are also available for inspection and copying in the Public Reference Room, Plaza Level, 1250-23rd Street, N.W., Washington, D.C. 20554.

For further information, contact Michael Carowitz at (202) 418-0960.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Tele-Communications, Inc. and Liberty Media Corporation — File Nos. CAR-44064-09, *et al.* and CAR-44641-01, *et al.*

Applications for Consent to Transfer Control of Radio Licenses

ORDER

Adopted: August 1, 1994; Released: August 1, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. In March and April 1994, Tele-Communications, Inc. ("TCI") and Liberty Media Corporation ("Liberty" and collectively "Applicants") filed applications, pursuant to section 310(d) of the Communications Act, 47 U.S.C. §310(d), for Commission authority to transfer over 400 licenses in the Cable Television Relay Service ("CARS"), as well as over nine hundred other jurisdictional licenses.[1] Applicants seek these licenses in order to facilitate the merger of TCI and Liberty into a single corporation, TCI/Liberty Holding Company ("TCI/Liberty"). As explained below, under the circumstances of this case, the proposed CARS license transfers serve the public interest, convenience and necessity. Accordingly, the transfer applications will be granted.[2]

II. BACKGROUND

A. Description of the Applicants

2. TCI is the largest cable multiple systems operator ("MSO") in the United States. TCI currently owns cable systems which distribute video programming to approximately 10.5 million subscribers, passing approximately 17.5 million households nation-wide.[3] TCI's share represents approximately 18% of all subscribers and 19.3% of homes passed nation-wide.[4] TCI generated over $4 billion in revenues in 1993.[5] As of March 31, 1994, TCI valued its total assets at over $17 billion. TCI also listed debts and liabilities totalling approximately $14.4 billion.[6]

3. Liberty has direct or indirect interests in systems that serve 3.2 million subscribers, approximately 5.4% of all subscribers nation-wide.[7] Liberty generated over $1.1 billion in revenues in 1993.[8] As of March 31, 1994, Liberty valued its total assets at over $1.5 billion and listed debts and liabilities of approximately $779 million.[9]

4. In addition, both TCI and Liberty have substantial financial stakes in several suppliers of video programming services. TCI has financial or management interests in programming vendors such as Discovery Communications, Inc. (which supplies the Discovery Channel, The Learning Channel and YOUR CHOICE TV), E! Entertainment Television, Reiss Media Enterprises (which supplies Request Television), Home Shopping Network, Inc., QVC Network, Inc., QE+ Ltd. (which supplies Starz!), Rocky Mountain Prime Sports Network, and Turner Broadcasting Systems, Inc. (which supplies several networks such as CNN, Headline News, The Cartoon Network, WTBS, and TNT).[10] Liberty has financial or management interests in several programming vendors, such as BET Holdings, Inc., Video Jukebox Network, Inc., Court TV, Encore Media Corp., International Family Entertainment, Inc. (which supplies the Family Channel and Cable Health Club), Home Shopping Network, Inc., QVC Network, Inc., Prime Sports Network and more than a dozen regional sports channels.[11]

5. In addition to its cable system and programming interests, TCI also has interests in various non-cable distribution technologies, including an interest in Primestar Partners, a medium power direct broadcast satellite ("DBS") joint venture with other cable operators;[12] ownership of a construc-

---

[1] Applicants filed with the Commission staff a list of their license transfer applications which also includes the following: five experimental PCS licenses, ten low-power television licenses, 26 operational fixed service licenses, 574 business radio licenses, 37 earth station licenses, three international satellite licenses, one direct broadcast satellite construction permit, and 273 common carrier point-to-point microwave licenses. *See* Attachment 1 to July 15, 1994 letter from Joe Sims, et al. to James W. Olson, Chief, Competition Division, Cable Services Bureau (hereinafter "Submission").

[2] The pending transfer applications in other services, referenced above, will be acted on by the responsible Bureaus.

[3] Subscriber and household numbers based upon January 31, 1994 estimate by Paul Kagan Associates Inc., as reported in *Cable World* (June 13, 1994) at 61. Applicants' proxy statement reports that TCI-owned systems serve 10.7 million subscribers. Proxy Statement of Liberty and TCI for Special Meetings of Stockholders to be held August 4, 1994 (hereinafter "Proxy Statement") at 63.

[4] Based upon 59,070,000 nation-wide subscribers and 90,700,000 homes passed, as estimated by Paul Kagan Associates on January 31, 1994. NCTA, *Cable Television* Developments (April, 1994) at 1-A. For purposes of the Commission's horizontal ownership rules, *see* note 26 *infra*, TCI has "attributable interests" in several other cable systems, including those of Liberty, which are not reflected in the subscriber and household numbers described above. Taking all of these interests into account, TCI serves approximately 13,487,000 subscribers (22.8%) and reaches 23,800,000 of the homes passed by cable (26.24%). See TCI Submission in MM Docket No. 92-264 (Sept. 22, 1993).

[5] Proxy Statement at F-5.

[6] Proxy Statement at F-3.

[7] Proxy Statement at 64.

[8] Proxy Statement at F-10.

[9] Id. at F-8.

[10] *See* July 21, 1994 letter from Kathryn M. Fenton, Esq. to Martin L. Stern, Competition Division, Cable Services Bureau (hereinafter "July 21 Letter").

[11] See Liberty Comments in CS Docket No. 94-48 at 7-10 (June 29, 1994) (hereinafter "Liberty Comments").

[12] See TCI 1993 Annual Report to Shareholders at 17. In 1993, Primestar and its cable industry partners entered into proposed consent decrees settling civil antitrust claims brought by the Department of Justice and the Attorneys General of forty states

tion permit for the launch and operation of a high-power DBS satellite through its wholly owned subsidiary, Tempo Satellite; and ownership of Netlink USA, a nation-wide distributor of programming to home satellite-dish users.[13] In addition, TCI has interests in a number of satellite transponders used in the distribution of satellite programming and offers a range of services to programmers including traffic and scheduling, transmission, compression, encryption, and uplink services.[14] In addition to its cable system and programming interests, Liberty also owns Southern Satellite, Inc., a firm which uplinks and distributes superstation WTBS.[15]

6. As a result of the proposed merger, TCI/Liberty would have interests in cable systems that provide service to more than 13 million subscribers, approximately 23% of all cable subscribers nation-wide, and would pass approximately 23.8 million homes (over 26.2% of homes passed nationwide).[16] The merged entity is projected to have over $18.45 billion in assets, would generate over $5.3 billion per year in revenue, and lists $15.1 billion in debt and liabilities.[17]

B. Reason for Creation of Liberty

7. Liberty was created in 1991 as part of a restructuring of TCI assets. Applicants state that TCI's management decided in 1990 to create Liberty because they believed that Congress or the Commission might increase regulation of the cable television industry and that such regulation might require divestiture by TCI of a significant portion of its interests.[18] TCI states that its Board of Directors believed that creating Liberty might allow TCI to "avoid or reduce the likelihood of future forced divestiture of assets."[19] Also, the smaller Liberty "might have greater regulatory freedom" than TCI in pursuing growth opportunities in programming and distribution.[20]

8. In early 1991, TCI assigned to Liberty most of TCI's interests in cable programming services (except for its interests in TBS and one other programming service) and some of TCI's interests in certain cable television operating companies.[21] In exchange for these assets, TCI received Liberty shares valued at an aggregate price of $625 million and TCI shareholders were given the opportunity to invest in Liberty.[22]

C. Reason for Instant Merger

9. In 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992.[23] Section 11 of the 1992 Cable Act directed the Commission to issue regulations that establish "reasonable limits" on both the number of channels on a cable system that may be occupied by programmers affiliated with the cable system operator and the number of cable subscribers an entity can reach through affiliated cable systems.[24] In addition, Congress directed the Commission to "consider the necessity and appropriateness of imposing limitations on the degree to which multichannel video programming distributors may engage in the creation or production of video programming."[25] Pursuant to this Congressional mandate, on September 23, 1993, the Commission adopted rules that prohibit one entity from having an "attributable interest" in cable systems that reach more than 30% of cable homes passed nation-wide (the "horizontal ownership rules")[26] and limited to 40% the number of activated channels that can be occupied by video programming services in which a cable system operator has an "attributable interest" (the "channel occupancy rules").[27] The Commission declined to establish further restrictions on the ability of cable systems to engage in the creation or production of video programming.[28]

10. In determining what is an "attributable interest," the Commission adopted the broadcast attribution criteria contained in 47 C.F.R., § 73.3555 (1993).[29] These rules attribute to an MSO general partnership interests, voting interests of 5% or greater, common directors or officers, and limited partnership interests when the limited partner is materially involved in the management or operation of

---

relating to access by competing distributors to the programming of the partners' affiliates. United States v. Primestar Partners, 1994-1 Trade Cas. (CCH) ¶ 70,562 (S.D.N.Y. 1994); *State of New York ex rel. Abrams v. Primestar Partners*, 1993-2 Trade Cas. (CCH) ¶ ¶ 70,403, 404 (S.D.N.Y. 1993).

13 See TCI 1993 Annual Report to Shareholders at 17; Submission, Attachment 1.

14 See July 21, 1994 Letter and Attachments. According to one published report, a TCI official has acknowledged that TCI is "well on [its] way to controlling virtually half of all U.S. transponders devoted to video." "Compression to be Late," TV Digest, May 9, 1994 at 4.

15 Liberty Comments at 10.

16 See note 4, *supra*.

17 Proxy Statement at F-19-21.

18 See Submission at 4.

19 Id.

20 Id.

21 *Id.; see also* TCI 1990 Annual Report to Shareholders at 26.

22 Proxy Statement at 20.

23 Pub. L. No. 102-385, 106 Stat. 1460 (1992).

24 47 U.S.C. § 533(f)(1)(A)-(B).

25 47 U.S.C. § 533(f)(1)(C).

26 *Second Report and Order, Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992--Horizontal and Vertical Ownership Limits*, MM Docket No. 92-264, 8 FCC Rcd 8565, ¶ 25 (1993) (hereinafter, *"Second Report and Order"*). The horizontal ownership rules allow this percentage to rise to 35% of homes passed if the additional systems are "minority-controlled." *Id.* at ¶ 28. The attribution rules define "minority-controlled" as a system "more than 50 percent owned by one or more members of a minority group." 47 C.F.R. § 73.3555(e)(3)(iii).

27 Second Report and Order at ¶ 65. The 40% channel occupancy rule applies to activated channels (less channels reserved for broadcast, leased access, public, educational and government use) and only for the first 75 channels offered. Id. at ¶ ¶ 54, 84. Two additional affiliated channels or up to 45% are allowed if the additional channels are minority-controlled. *Id.* at ¶ 71. Local and regional programming channels are also exempt from the channel occupancy rules. Id. at ¶ 78.

The numerical percentages of both the horizontal ownership and the channel occupancy rules, inter alia, are currently under reconsideration by the Commission. See Petition for Reconsideration of Consumer Federation of America and Center for Media *Education*, MM Docket No. 92-264 (Dec. 15, 1993). In addition, the underlying statute for the horizontal ownership rules has been ruled unconstitutional. However, this decision has been stayed pending appeal. *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 10 (D.D.C.), *appeal docketed and pending*, Civ. Act. No. 93-5290 (D.C. Cir. 1993).

28 Second Report and Order at ¶ 106.

29 Second Report & Order at ¶ ¶ 34, 61. This attribution

the system.[30] In addition, the rules will attribute a system to an MSO when there is "actual working control" which is not bound up in any formal stock or financial interest.[31]

11. By virtue of their common directors and officers and because each firm is controlled by the same group of shareholders, TCI and Liberty were viewed as "affiliated" entities under these rules.[32] Applicants determined, however, that even with this mutual attribution, they were in compliance with the horizontal ownership and channel occupancy rules. Applicants state that, for this reason, in the summer of 1993, the companies began to consider a possible recombination.[33] According to Applicants, the legislative and regulatory uncertainty that might have required forced divestiture -- and which therefore instigated the creation of Liberty -- was "eliminated."[34] On January 27, 1994, a Merger Agreement was signed by the firms.[35]

12. During this period, the Antitrust Division of the U.S. Department of Justice initiated an inquiry into the proposed merger. On April 28, 1994, the Department of Justice approved the merger after Applicants consented to enter into a Final Judgment (the "proposed consent decree") in the U.S. District Court for the District of Columbia.[36] This proposed consent decree enjoins Applicants from engaging in certain types of anticompetitive or discriminatory behavior.[37]

13. Applicants filed with the Commission successive sets of CARS transfer applications, which were placed on public notice on March 9, April 6, April 28, May 11, and May 25, 1994. During this period, Applicants also filed hundreds of other applications to transfer the other licenses associated with the merger. No petitions to deny or other public comments were filed with the Commission.

14. Given the size of the proposed merger and the lack of public comments, the Applicants were asked to make available for examination certain documents and information relating to the proposed merger. Applicants were also asked to file written comments and other information addressing why the proposed transfers are in the public interest.

D. Applicants' Submission

15. On July 15, 1994, Applicants filed their Submission in support of their license applications. Applicants make three primary arguments. First, Applicants argue that the "competitive implications of the transaction have already received a very comprehensive analysis" by the Department of Justice. According to the Applicants, the proposed consent decree "in essence" restates the Commission's program access and program carriage rules[38] and will protect against any possibility of anticompetitive conduct.[39] Second, Applicants argue that because the transaction falls within the limits established by the Commission's horizontal ownership and channel occupancy rules, further Commission inquiry is unnecessary. Similarly, Applicants argue that the presence of the Commission's program access and program carriage rules will prevent any future anticompetitive impact from the merger and, therefore, further Commission inquiry is unnecessary.[40] Finally, Applicants supply a list of efficiencies which they claim will materialize if the merger is consummated.[41]

III. DISCUSSION

A. Statutory Authority

16. Under Title III of the Communications Act, the Commission must determine whether proposed license transfers will serve the public interest, convenience and necessity.[42] Under this standard, the Commission is required to "make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations."[43] If the Commission finds that the proposed transaction would result in anticompetitive effects, the Commission may impose appropriate remedial conditions,[44] or deny the proposed license transfer altogether.

17. The Commission's mandate to consider competitive issues as part of the public interest standard under the Communications Act is a separate and distinct obligation from the Department of Justice's responsibility to enforce the antitrust laws. Indeed, separate review by the Department of Justice and the Commission is common.[45] As the Commission noted in ABC Cos. Inc., 7 FCC 2d 245, 249

---

criteria was suggested by the legislative history of the 1992 Cable Act. Senate Committee on Commerce, Science and Transportation, S. Rep. No. 102-92 at 80, 102d Cong., 1st Sess. (1991).

30 47 C.F.R. § 73.3555, note 2 (1993).

31 47 C.F.R. § 73.3555, note 1 (1993).

32 Submission at 7; 47 C.F.R. §73.3555, note 2 (1993).

33 Submission at 5; *see also* Proxy Statement at 29.

34 Submission at 5.

35 Proxy Statement at 26.

36 *See United States v. Tele-Communications, Inc.*, 7 Trade Reg. Rep. (CCH) ¶ 50,757 (D.D.C., filed April 28, 1994).

37 *See* Submission at 2-3.

38 *See First Report and Order, Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming and Carriage*, 58 Fed. Reg. 27,658 (1993) (the "program access rules"); *Second Report and Order, Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming and Carriage*, 58 Fed. Reg. 60,390 (1994) (the "program carriage rules").

39 Submission at 2-3.

40 Submission at 7-10.

41 *Id.* at 5-7.

42 *See* 47 U.S.C. § 310(d).

43 *United States v. FCC*, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (*en banc*) (quoting *Northern Natural Gas Co. v. FPC*, 399 F.2d 953, 961 (D.C. Cir. 1968)); *see also Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 755-62 (1973); *FCC v. RCA Comm., Inc.*, 346 U.S. 86, 94 (1952).

44 *See, e.g., In re General Telephone and Electronics Corporation and Telenet Corp.*, 72 FCC 2d 111 (1979) (*GTE-Telenet*), *request for comments*, 85 FCC 2d 409 (1981), *order on monitoring compliance*, 91 FCC 2d 215 (1982); *In re GTE Corp. and Southern Pacific Company*, 94 FCC 2d 235 (1983); *Declaratory Ruling and Order, MCI Communications Corp. and British Telecommunications plc*, FCC 94-188 (July 25, 1994)(hereinafter "*MCI-BT*").

45 See, e.g., ABC Cos., Inc., 7 FCC 2d 245, 249 (1966); *In re United Telecommunications, Inc. and U.S. Telephone, Inc.*, 98 FCC 2d 1306 (1984); *MCI-BT*, FCC 94-188, slip op. at 26-27.

(1966), "the standards governing |the Department of Justice| and the action of the Commission are significantly different. The Antitrust Division is charged with the enforcement of the antitrust laws . . . , while the Commission is charged with effectuating the policies of the Communications Act." Under this statute, the Commission must ensure that the proposed transfers serve the public interest, convenience and necessity.

18. This dual competitive review of cable industry mergers was illustrated in Teleprompter Corporation.[46] There, Teleprompter sought to transfer more than 100 CARS licenses to Westinghouse Broadcast Company to facilitate a merger between the two. Prior to the filing of these applications with the Commission, however, the Department of Justice reviewed the proposed merger and found that the transaction would not violate the federal antitrust laws.[47] Nonetheless, the Commission held that while the Communications Act required it to analyze the anticompetitive effects resulting from this merger, it was not required to apply the antitrust laws in the same manner as the Department of Justice or the Federal Trade Commission. According to the Commission:

> It is not our function to apply the antitrust laws as such. *It is our duty, however, to|refuse licenses or renewals to any person who engages or proposes to engage in practices which will prevent either himself or other licensees or both from making the fullest use of radio facilities.* This is the standard of public interest, convenience and necessity which we must apply to all applications for licenses and renewals.[48]

Therefore, while the Commission must "make findings related to the pertinent antitrust policies," the Commission has the broader responsibility to consider other factors as well.

19. Applicants' argument that the existence of the Commission's horizontal ownership and channel occupancy rules and the Commission's program access and program carriage rules obviates the need for an independent Commission review under Title III of the Communications Act is similarly flawed. The Commission's authority to review license transfers stems directly from Title III of the Act. In contrast, the various rules relied upon by Applicants were promulgated pursuant to the Commission's authority under Title VI of the Communications Act. These responsibilities are legally independent -- the existence of the Title VI rules in no way limits the duty under Title III to determine whether proposed license transfers are in the public interest.

20. The presence of the horizontal ownership rules does not obviate the need for Commission scrutiny of a cable industry merger below the 30% threshold. Generally, an efficient firm will increase its market share by slowly growing in small increments as a result of successful competition. A merger, by its very nature, allows a competitor to dramatically accelerate this process by instantly acquiring substantial new market share. Thus, the 30% rule places a ceiling on ownership above which no operator may go. It does not provide an automatic "safe-harbor" for all mergers creating entities reaching fewer than 30% of homes passed nation-wide. Indeed, if the Commission were to follow Applicants' argument to its logical conclusion, the 30% rule would allow, without further scrutiny, the merger of the MSOs currently ranked as the second, third, fourth and fifth largest in the nation.[49] Accordingly, the Commission cannot |blindly rely on the horizontal ownership rules without also examining the merger's broader effect on the public interest.[50]

21. Similarly, exclusive reliance on the Commission's program access and program carriage rules to protect consumers from the adverse affects of a cable industry merger would create several problems. These rules establish a complaint procedure to provide relief to individual competitors in the program supply and distribution markets for specific acts of anticompetitive or discriminatory conduct.[51] Exclusive reliance on a series of individual complaints would prevent the Commission from obtaining a clear picture of the evolving structure of the entire market, and addressing competitive concerns as they arise. It is well established that the "public interest" means the interest as a whole; not the interest of any one individual.[52] Therefore, if the Commission exclusively relied on individual complaints, it would only become aware of specific anticompetitive problems if and when the individual complainant's interests coincided with those of the interest of the overall "public." Indeed, effective review at the initial stage of the transaction (i.e., the license transfer) provides a prophylactic mechanism by which the Commission can anticipate and address the potential anticompetitive effects resulting from a proposed merger beforehand, rather than await the filing of individual complaints.[53] In addition, early identification of potential anticompetitive harm will also serve to mitigate the proliferation of complaints under the Commis-

---

[46] 87 FCC 2d 531 (1981).

[47] Id. at ¶ 58.

[48] Id. at ¶ 21 (footnote and citations omitted and emphasis supplied).

[49] Based upon Paul Kagan Associates data, as of January 31, 1994, as listed in Cable World (June 13, 1994) at 61, and NCTA, Cable Television Developments (April 1994) at 1-A.

[50] Moreover, we note that in light of the district court decision in Daniels, *supra* note 27, the Commission has temporarily stayed enforcement of its horizontal ownership rules. Second Report and Order, 8 FCC Rcd 8565 at ¶ 109.

[51] *Id.* at ¶ 123 ("Thus, we will adopt a system . . . on the basis of a complaint, answer and reply.")

[52] See Northeast Utilities Service Co. v. FERC, 933 F.2d 937, 951 (1st Cir. 1993); see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (antitrust laws are designed to protect competition, not competitors).

[53] Indeed, a similar scheme exists under the federal antitrust laws. Congress established Section 7 of the Clayton Act as a prophylactic measure, prohibiting mergers where there is a likely probability that a proposed transaction will substantially lessen competition in any relevant market. In contrast, Congress also established Sections One and Two of the Sherman Act to remedy specific acts of individual and collective anticompetitive conduct. See Brunswick, 429 U.S. at 485 (Section 7 is a "prophylactic measure 'intended to arrest and apprehend the consequences of intercorporate relationships before those relationships could work their evil . . . .'"); see also Brown Shoe Co.v. U.S., 370 U.S. 294, 317-318, 323 (1962).

sion's rules. Finally, there may be anticompetitive effects flowing from a merger which may not be addressed or remedied by the Commission's rules.

B. Analysis of the Proposed Transfers

22. Under this analysis, it is important to address potential competitive effects that result directly from this merger. At issue is whether the merger will permit the merged company to increase or create market power or otherwise increase the ability to engage in exclusionary or predatory conduct. The answer here is no.

23. The individual facts of each case dictate the nature of the economic analysis that the Commission should apply. For example, when two competitors in the same market (especially a highly concentrated market) seek to merge, the merged entity may gain via the merger such a significant share of the relevant market that it could exercise monopoly power by profitably raising and maintaining prices over a significant period of time, or otherwise adversely affect product quality, service or innovation.[54] Vertical mergers present another set of problems. As the Commission recognized over thirteen years ago, "not every vertical acquisition threatens competition." Rather, the Commission is only concerned with "a vertical acquisition which 'tends significantly to raise barriers to entry . . . or to disadvantage existing nonintegrated or partly integrated firms . . . in ways unrelated to economic efficiency.'"[55] However, the Commission also noted that:

> [v]ertical integration has conflicting components, in terms of the incentives involved. While it may create a natural tendency for the systems involved to deal with affiliated enterprises, it is also the engine for the creation of new products and services to increase the value of the total package of services offered [to] the public. Given the conflicting incentives involved, we believe it would be inappropriate to conclude on any general basis that vertical integration is undesirable. *Rather, what appears to be required is scrutiny of particular aspects of these vertical relationships for adverse consequences.*[56]

Therefore, the Commission must carefully evaluate each element (horizontal and vertical) of the proposed merger and determine whether the transaction, *as a whole*, will serve the public interest, convenience and necessity.[57] Given the facts of this case, the merger raises no competitive concerns.

24. It is well established under federal antitrust law that corporate consolidations generally do not create competitive concerns. For example, in United States v. Citizens & Southern National Bank,[58] the Supreme Court found that a merger of two jointly-controlled banks did not violate section 7 of the Clayton Act because the proposed acquisition would not alter past or present competitive conduct or relationships and because there was no "realistic prospect that the denial of these acquisitions would lead the defendant banks to compete with each other."[59] Similarly, in Ball Memorial Hospital v. Mutual Hospital Insurance, Inc.,[60] the Seventh Circuit found that a proposed merger between two affiliated insurance companies did not violate section 7 of the Clayton Act because the two affiliates had previously acted as one company and it was "therefore appropriate to treat them as if they had been one corporation all along." According to the court, because the affiliate merger would "not change the conditions of competition in the market," the "merger of firms that were jointly controlled does not call for close scrutiny."[61]

25. Applying this reasoning, the merger of TCI and Liberty will not affect the current state of competition in the cable television industry because the firms are commonly controlled and pursue complementary and coordinated business strategies.

26. In particular, the record reflects that the same five shareholders control stock having over 75 percent voting power in Liberty and approximately 55 percent voting power in TCI.[62] These same five shareholders will have approximately 67.57% voting power in TCI/Liberty.[63] In addition to joint control of voting shares, the two companies (and the merged firm) have a number of common officers and directors. Bob Magness simultaneously serves as Chairman of the Board of TCI and as a director of Liberty, and John Malone simultaneously serves as Chairman of the Board of Liberty and as President, Chief Executive Officer and a director of TCI.[64] Dr. Malone is the president and chief executive officer of TCI/Liberty, and Mr. Magness is the merged company's chairman.[65] In addition, Liberty was created from TCI's assets, and Liberty's initial management team consisted largely of former TCI officers and employees, many of whom "had been actively involved in the management or operations of the[se] assets . . . "[66]

27. Moreover, the record shows that since the creation of Liberty, TCI and Liberty have closely cooperated in the pursuit of common business strategies.[67] For example, Satellite Services, Inc., a wholly owned subsidiary of TCI, purchases sports and other programming for Liberty's cable

---

[54] See U.S. Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 44,552 at § 0.1 & n.6 (1992).

[55] In re Teleprompter Corporation, 87 FCC 2d 531 at ¶ 58 (1981)(citations omitted).

[56] Id. at ¶ 61 (footnotes omitted and emphasis supplied). These balancing incentives take on added significance in the cable industry, where firms must commit significant sunk costs at both the programming and distribution level. Therefore, in such an environment, increased vertical integration may, in some circumstances, be attractive as a means of reducing risk.

[57] C.f., Northeast Utilities Service Company v. FERC, 933 F.2d 937, 951 (1st Cir. 1993).

[58] 422 U.S. 86 (1975).

[59] Id. at 121-22.

[60] 784 F.2d 1325 (7th Cir. 1986).

[61] Id. at 1337.

[62] These shareholders are Bob Magness, John C. Malone, Kearns-Tribune Corp., The Capital Group, Inc., and Associated Communications Corp. Submission at 4-5.

[63] Proxy Statement at 99.

[64] Submission at 5.

[65] Proxy Statement at 84.

[66] Proxy Statement at 21.

[67] Submission at 4-5. The Proxy Statement notes that TCI and Liberty "share a similar management philosophy" and "[w]hen appropriate, the two companies have pursued complementary business strategies." Proxy Statement at 21.

subsidiaries.[68] In addition, the Proxy Statement lists a number of close commercial and financial arrangements between the two firms.[69] Indeed, one of the primary claimed efficiencies resulting from the merger is the elimination of potential conflicting corporate fiduciary duties which currently result from this close cooperation.[70]

28. In sum, because TCI and Liberty have operated more like corporate affiliates and only as separate, independent corporations to a limited extent, the license transfers will not eliminate any existing competition between the merging parties[71] or facilitate their ability to engage in anticompetitive conduct.[72] *See Citizens & Southern*, 422 U.S. at 121-22; Ball Memorial Hospital, 784 F.2d at 1337.

29. In their Submission, Applicants have presented a list of alleged efficiencies flowing from the proposed merger. According to Applicants, the recombination of the two companies would permit management to operate the businesses of both companies without concern over the legal barriers imposed by separate public ownership, would ensure better oversight of regulatory compliance, and would allow for a common strategy for accessing financial markets. Moreover, Applicants claim that the recombination would contribute to TCI's ability to ensure the supply of quality programming for its cable systems. Applicants also argue that the recombination would enable Applicants to achieve synergies in marketing programming for foreign distribution through a combination of programming investments of TCI and Liberty. Applicants also argue that the acquisition and creation of video programming is becoming increasingly competitive as various forms of media distribution (including cable television, telephony, and computer hardware and software manufacture) unite in strategic alliances to compete in the delivery of entertainment and information services to customers. Applicants maintain that in order for Liberty to pursue attractive programming properties in this environment, it would need access to increasingly larger pools of capital, which the recombination with TCI allows. Applicants further argue that in order to continue to build shareholder value, absent the recombination, Liberty would soon need to consider various options to raise capital to invest in new ventures or to increase its ownership in certain of its current investments.[73]

30. The existence of such efficiencies, ordinarily, is an important factor in the "public interest" analysis and may offset the existence of potential competitive effects which may result from a merger. Here, Applicants' purported efficiencies are a further reason to approve these transfers.[74]

IV. CONCLUSION

31. Under the circumstances of this case, Applicants' proposed CARS license transfers serve the public interest, convenience and necessity. The proposed merger represents a corporate reconsolidation of businesses and assets that were severed only three years ago. Although TCI and Liberty are separate legal entities today, they have been commonly controlled and have shared collective corporate interests from the time Liberty was formed. Moreover, no party has filed petitions to deny or comments on these applications. Accordingly, Applicants' proposed transfer would not adversely affect the competitive status quo.

V. ORDERING CLAUSE

32. Accordingly, IT IS ORDERED that the pending CARS license transfer applications referenced herein shall be GRANTED.

33. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321 (1993).

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

---

[68] Proxy Statement at 69.

[69] Proxy Statement at 65-69.

[70] TCI accounts for its investment in Liberty under the equity method of accounting "due to the significant economic interests held by TCI through its ownership of Liberty preferred stock and Liberty Common stock and other related party considerations." TCI 1993 Annual Report to Shareholders at 41.

[71] As Applicants point out in their Submission (at 10), the merger will not result in the elimination of any overbuilt cable systems.

[72] There have been published reports raising possible concerns about TCI's construction and operation of its National Digital Television Center, a facility through which the analog feeds of participating programming services are converted into a compressed and encrypted digital format and then uplinked to satellites for distribution to cable systems and to home satellite users. See, e.g., "MSOs Split on TCI's Headend in the Sky," *Multichannel News*, March 28, 1994 at 1. While access to developing technologies and the potential for the creation of bottleneck facilities are concerns, nothing in these published reports suggests any issues concerning TCI's operation of the National Digital Television Center that flow from the merger of TCI and Liberty or that need be considered in the context of the instant matter. While the Digital Television Center opened in April, 1994, it appears that the digital set-top terminals necessary to bring digital television to cable subscribers nationally are not yet commercially available. *See* 1993 TCI Annual Report to Shareholders at 16; "Compression to be Late," Television Digest, May 9, 1994 at 4.

[73] Submission at 6-7.

[74] Efficiencies relating to "general selling, administrative, and overhead expenses . . . as a practical matter . . . may be hard to demonstrate." 1992 Department of Justice/Federal Trade Commission Joint Merger Guidelines, 57 Fed. Reg. 41,552 at § 4 (1992). License applicants, however, should, at a minimum, provide some record evidence to support their claim. In that regard, Applicants' submission on the claimed efficiencies from the transaction, unsupported by record evidence, is less of a showing than would be required in a case presenting more serious competitive questions.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-430

In re Applications of

MARIA M. OCHOA File No. BPH-890615ME

FOOTHILLS BROADCASTING, INC. File No. BPH-890616MR

For Construction Permit for
New FM Station, Channel 277A,
Lenoir, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: August 24, 1994; Released: September 7, 1994

By the Review Board: MARINO (Chairman) and GREENE.

1. Foothills Broadcasting, Inc. filed a motion for dismissal of Exceptions to Supplemental Initial Decision, and a companion motion to postpone procedural dates on August 4, 1994, which Maria M. Ochoa opposed on August 10, 1994. We deny Foothills' motion to dismiss Ochoa's exceptions for the reasons set out below and, on our own motion, accord Foothills additional time to reply to the exceptions.

BACKGROUND

2. By *Memorandum Opinion and Order*, 8 FCC Rcd 3135, released on May 10, 1993, the Commission affirmed a Review Board *Decision*, 7 FCC Rcd 6569 (1992), which disqualified Ochoa for giving deceptive testimony, and granted the application of Foothills which was not found to be disqualified. Later, on December 28, 1993, in another *Memorandum Opinion and Order*, 9 FCC Rcd 56, the Commission reaffirmed the denial of Ochoa's application but granted in part Ochoa's motions to enlarge issues, reopened the record and remanded the case for a further hearing on the following issues:

> (a) Whether Foothills Broadcasting, Inc. and/or Steve Frank attempted to deceive the Commission by representing, in an opposition pleading filed on June 30, 1993 and an attached affidavit in the "Summary" filed on July 16, 1993 as an attachment to an opposition to a strike motion, that Mr. Frank had secured assurance of access to Foothills' proposed transmitter site by procuring a declaration of consent from Clyde Keyes;
>
> (b) Whether Steve Frank and/or Foothills misrepresented, in a pleading filed with the Commission on June 30, 1993, the duration of the interval between the communication of Hennessee's oral and written notices of refusal;
>
> (c) Whether Foothills lost reasonable assurance of access to its proposed transmitter site for more than 30 days and violated 47 C.F.R. §1.65 by failing to report this; and
>
> (d) In light of the evidence adduced under the foregoing issues, whether Foothills is qualified to be a licensee.
>
> (e) In light of the evidence adduced under issues (a) and (b), whether a forfeiture penalty should be assessed against Foothills pursuant to 47 U.S.C. §503, subsections (b)(1), (b)(2)A), and (b)(3), 47 C.F.R. §1.80, subsections (b) and (g), and 47 C.F.R. §1.229(f) for violation(s) of 47 C.F.R. §1.17, in an amount of up to $25,000 for each violation.

The burdens of proceeding and of proof on these issues were placed upon Foothills, *id.*, at ¶ 29. The Commission also referred to the ALJ part of Ochoa's fourth motion to enlarge the issues for disposition in conjunction with the remand hearing. *Id.*, ¶ 31. On January 27, 1994, Ochoa filed a further petition for reconsideration seeking clarification of its status from the Commission, as a prelude to a possible court appeal pursuant to 47 USC 402(b)(1), which is still pending.

3. The Commission's remand order did not order the termination of Ochoa's participation in this docket, and Ochoa's application remained in the caption of the case of the Commission's remand order; thereafter, the ALJ stated in his *Remanded Prehearing Order*, FCC 94M-10, released January 10, 1994, that "since Ochoa has actively solicited the remanded issues, and since Foothills will probably not adduce evidence that is patently unfavorable to its position, Ochoa will be expected to actively participate in the remanded hearing." Both applicants actively participated in the hearing, filing proposed findings of fact and conclusions of law, and reply findings. *See* ¶ 4 of *Supplemental Initial Decision* (*SID*) of Administrative Law Judge Miller, FCC 94D-6, 9 FCC Rcd at 3100. The remanded issues were resolved in favor of Foothills in the *SID*, at ¶ ¶ 3-6 (Concls.), and on August 1, 1994, Ochoa filed Exceptions to the *SID*.

4. Foothills has moved to dismiss Ochoa's exceptions arguing that only parties to a case may file exceptions, 47 CFR 1.276, and that Ochoa lost her standing as a party to this proceeding when the Commission reaffirmed the denial of Ochoa's application in the *Remand Order*, *supra*, 9 FCC Rcd at 56-59. Foothills further argues that after the Commission added the remanded issues, Ochoa failed to intervene either as a party in interest pursuant to 47 CFR 1.223(a), or as a matter of discretion to assist in the resolution of the remanded issues pursuant to 47 CFR 1.223(b). In any event, according to Foothills, several cases establish that "former applicants do not qualify as parties to Commission proceeding." *See* Motion, pp. 2 and 3.

5. Ochoa responds in opposition that Foothills has ignored the fact that the Commission's remand order and the ALJ's *SID* "captioned her as a party to the remand proceeding." Ochoa further argues that because Foothills did not object to the ALJ's recognition of Ochoa's participation as a party to the remand hearing, Foothills waived its

objection. *See* 47 CFR 1.277(a). Ochoa adds that Foothills' objection to the Commission's action in the remand order must be presented to the Commission, and not the Board, citing *Atlantic Broadcast Co.*, 5 FCC 2d 717 (1966). Ochoa also claims she has status as a party based upon the fact that she sought the issues against Foothills, which resulted in the remanded hearing, citing *Juarez Communications Corp.*, 56 RR 2d 961, 962, ¶ 2 (Rev. Bd. 1984); *Radio Lares*, 63 FCC 2d 305, 306, ¶ 4 (1977). Finally, Ochoa bases her party status on participation in the remand hearing "at the directive of the ALJ... at a cost of considerable time and expense [so that] it is an 'aggrieved' party within the meaning of 47 USC § 402(b)(6)."

DISCUSSION

6. There are several reasons why we do not dismiss Ochoa's exceptions. Although Foothills argues that "former applicants do not qualify as parties to Commission proceedings," Foothills Motion at 2, it fails to distinguish between applicants who have been dismissed from the proceeding and applicants, like Ochoa, whose applications have been denied but not dismissed and the denial has not become final because of a pending appeal. *Compare Roxanne Givens*, 6 FCC Rcd 873, 873 n.2 (Rev. Bd. 1991) (dismissed applicant has no standing in proceeding after dismissal), *Denton FM Radio, Ltd.*, 56 RR 2d 171 (Rev. Bd. 1984) (former applicant dismissed by Mass Media Bureau before hearing designation order was never party to proceeding and had no right to intervene), and *Denton FM Radio, Ltd.*, 58 RR 2d 265 (Rev. Bd. 1985) (same), *with Bennett Gilbert Gaines*, 9 FCC Rcd 533 (1994) (denied applicant who had moved to enlarge issues continued to participate actively when its motion was granted and the proceeding remanded), and *Capital City Broadcasting Co.*, FCC 93M-747, released December 13, 1993 (denied applicant expected to participate actively on issues remanded in *Capital City Broadcasting Co.*, 8 FCC Rcd 8478 (1993), until it formally asked to be dismissed from proceeding) (dismissal granted, FCC 94M-146, released March 11, 1994). In the instant proceeding, Ochoa was granted party status at the outset, her party status was not limited or withdrawn by any Commission order, she has actively participated at every stage in this docket, and her petition for reconsideration of the action on her application is pending before the Commission. Nothing further is required from Ochoa to continue as a party here. *Compare Garden State Broadcasting Ltd. Partnership v. FCC*, 996 F.2d 386, 395-396 (D.C. Cir. 1993) (former challenger disqualified in a comparative renewal proceeding was denied intervention in subsequent license transfers, where the transfers did not affect the challenger's disqualification); *Kenneth J. Crosthwait*, 79 FCC 2d 191, 192 n.5 (1980) (former applicant who had dismissed his appeal was denied intervention after court remanded proceeding involving the remaining applicant).

7. Even if Ochoa had lost her right to participate as a party after her application was denied, we could not find that the ALJ abused his discretion by allowing her continued participation. The remanded issues resulted from her motion to enlarge, and her knowledge of the facts at issue promised to and ultimately did provide assistance in determining the issues. *See* 47 CFR 1.223(b). Indeed, Foothills concedes that "Ochoa's participation below had the therapeutic effect of providing an opposing litigant interested in compiling a full record." Foothills Motion at 3. Foothills has offered no reason other than its desire to end this proceeding for summarily terminating Ochoa's participation now and ending its assistance.

8. Moreover, assuming that Foothills had a valid legal basis to preclude Ochoa's participation in the remand hearing (and thus an argument for dismissing Ochoa's exceptions), Foothills' objections come too late because it has not previously objected in a timely manner to Ochoa's continued participation. *See Coalition for the Preservation of Hispanic Broadcasting v. FCC*, 931 F.2d 73, 77 (D.C. Cir. 1991). Foothills could either have sought reconsideration when the Commission remanded the case and did not delete Ochoa from the case or objected when the ALJ directed Ochoa to actively participate in the remand hearing. It did neither and cannot now complain at this late stage of the proceeding.

9. Finally, even were we in agreement with Foothills that Ochoa had lost her standing as a party, we would, because of her active participation in this case, accept her pleading as an *amicus* brief because of the public interest importance of resolving the issues designated by the Commission. We, therefore, deny the motion to dismiss Ochoa's exceptions and direct Foothills to file its reply to those exceptions ten (10) days after the release of this *Memorandum Opinion and Order*.

10. ACCORDINGLY, IT IS ORDERED, That the Motion for Dismissal of Exceptions to Supplemental Initial Decision, filed on August 4, 1994, by Foothills Broadcasting, Inc. IS DENIED, and that its Motion for postponement of procedural dates *sine die* and for expedited action, filed August 4, 1994, IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-157

In the Matter of

Amendment of Section 73.202(b)	RM-7462
Table of Allotments,	RM-8184
FM Broadcast Stations.	
(Cleveland, Belzoni and Durant, Mississippi)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 24, 1994; Released: September 7, 1994

By the Chief, Policy and Rules Division:

1. At the request of Larry G. Fuss, d/b/a Contemporary Communications ("petitioner"), licensee of WDTL-FM (formerly WQAZ(FM)), Cleveland, Mississippi, and successor-in-interest to Robert G. Johnston, Trustee, the Commission has before it a *Notice of Proposed Rule Making*, 7 FCC Rcd 4840 (1992), proposing the substitution of Channel 225C2 for Channel 224A at Cleveland and the modification of Station WDTL-FM's license to specify operation on the higher class channel.[2] To accommodate the upgrade, petitioner also proposed the substitution of Channel 292A for Channel 225A at Belzoni, Mississippi, and the modification of Station WJSJ(FM)'s construction permit accordingly (RM-7462).[3] Delta filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. Comments and a counterproposal were filed by Radio Cleveland, Inc. ("RCI"), proposing the allotment of Channel 292A at Durant, Mississippi, as its first local aural transmission service (RM-8184).[4] Delta filed reply comments.

2. In its counterproposal, RCI states that Channel 292A can be allotted to Durant, Mississippi (population 2,838),[5] in compliance with the Commission's technical requirements and would place a predicted 70 dBu over the entire community. RCI argues that, according to the FM allotment priorities, a first local aural service is preferred to the upgrade of Station WDTL-FM at Cleveland, Mississippi, citing *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982) and *Andalusia, Alabama*, 49 F.R. 32201, August 13, 1984.[6] RCI affirms that it will apply for Channel 292A at Durant, if allotted.

3. In its reply comments, Delta disputes RCI's assertion that the proposed allotment at Durant would constitute a first local aural service. Delta claims that "there is no such provision in the Commission's allotment procedures," citing *Revision of FM Assignment Policies and Procedures, supra*.[7] Thus, Delta asserts that the allotment at Durant should be properly weighed under priority three, first local service. Delta argues that its proposed upgrade, weighed under priority four, would still be outweighed by RCI's counterproposal. However, Delta argues that the counterproposal is a "carefully crafted ruse" designed to thwart Station WDTL-FM's upgrade and thus constitutes a strike application. The Commission has noted, asserts Delta, that "a strike application is one that is filed for the purpose of impeding, obstructing or delaying the grant of a competing application," citing *Grenco, Inc*, 28 FCC 2d 166 (1971) and *Millar* v. *FCC*, 707 F.2d 1530, 1535 (D.C. Cir. 1983). Delta states that in *Grenco*, the Commission articulated four factors to be used to evaluate evidence of motive to file a strike application: time, economic and competitive benefits, applicant's good faith, and the availability of other frequencies. Delta submits that RCI's counterproposal reflects all four factors, and urges that the Commission investigate the timing and circumstances surrounding the filing of RCI's counterproposal to determine whether RCI has abused the Commission's processes.

4. Moreover, Delta recognizes that the Commission has generally preferred an allotment providing a new local service when compared with an upgrade. However, the Commission should, argues Delta, now consider the adverse effect this preference has had on the radio industry. The Commission should also recognize, declares Delta, the abuse inherent within the policy established in *Andalusia, supra*, where a competitor comes forward, as RCI has done in the instant proceeding, solely to block an upgrade by

[1] The community of Durant, Mississippi, has been added to the caption.

[2] As indicated in the *Notice* the instant petition was initially rejected as defective based upon a grant of Larry R. Scott's application for construction permit on Channel 225A at Belzoni, Mississippi. *See Letter* to Larry G. Fuss from Assistant Chief, Policy and Rules Division, October 18, 1990. Petitioner filed a petition for reconsideration of that action. We will treat petitioner's petition for reconsideration as a petition for rule making.

An application (File No. BAPL-920212HM) for assignment of the license of Station WDTL-FM from Larry G. Fuss, d/b/a Contemporary Communications to Delta Radio, Inc. ("Delta"), was granted on March 5, 1992. This assignment of license for Station WDTL-FM to Delta was consummated on March 15, 1992. Mr. Fuss is President and majority stockholder in Delta.

[3] As indicated in the *Notice*, in recognition of the Commission's policy concerning the involuntary relocation of an authorized transmitter, petitioner provided a copy of an agreement with Larry R. Scott ("Scott"), permittee of Station WJSJ(FM), consenting to a change in its authorized transmitter site, as well as its proposed channel of operation, to accommodate the modification for Station WDTL-FM.

[4] Public Notice of RCI's counterproposal was given on February 17, 1993, Report No. 1927.

[5] Population figure taken from the 1990 U.S. Census.

[6] The FM allotment priorities are: (1) First full-time aural service; (2) Second full-time aural service; (3) First local service; and (4) Other public interest matters. [Co-equal weight given on priorities (2) and (3)].

[7] Delta notes that the Commission in *Apalachicola and Carrabelle, Florida*, 6 FCC Rcd 7147 (1991), clarified that the "first allotment priority is provision of a first full-time aural service. This refers to *reception* service, not to *transmission* service. Allotment priority three, first local service, refers to provision of a community's first *transmission* service."

proposing a first local service at another community. Delta encourages the Commission to revise the policy established in *Andalusia* to acknowledge that expanded service by existing stations should not always be precluded by conflicting requests for a first local service to another community.

5. Delta asserts that although there are no alternate Class C2 channels available at Cleveland and no alternative Class A channels available at Belzoni, there are other Class A channels available at Durant. Delta claims that there are at least three alternate Class A channels (Channels 266A, 268A and 270A) that are available at Durant. Moreover, Delta states that the construction permit (File No. BPH-870327KD) for Station WJSJ(FM) for Channel 225A at Belzoni expired on August 25, 1992.[8] Therefore, Delta notes that Channel 225A could be removed from Belzoni without replacement, and that Channel 292A can be allotted to Durant in order to resolve the conflict.

6. Based on the information before us, we believe that each of the petitioners has shown that the public interest would be served by a grant of its respective request. Further, we find that each of the allotment requests can be accommodated and thus comparative consideration of the competing proposals is unnecessary. Thus, we need not address Delta's argument that the Commission should revise the allotment priorities. With respect to Delta's unsubstantiated claim that RCI filed its proposal to thwart Delta's proposed upgrade, at this stage of the proceeding the evidence is insufficient to show that the petition was filed as a strike petition. Thus, we believe that it would be in the public interest to allot an FM channel at Durant as its first local aural transmission service.

7. An engineering analysis has determined that Channel 266A can be allotted to Durant, Mississippi, in lieu of Channel 292A, thereby permitting the allotment of a Class C2 channel at Cleveland, Mississippi, and the allotment of a Class A channel at Durant. Therefore, we will substitute Channel 225C2 for Channel 224A at Cleveland, since this action would provide the community with a wide coverage area FM transmission service. In order to accommodate the upgrade at Cleveland, we will also substitute Channel 292A for the now vacant Channel 225A at Belzoni. In addition, we will allot Channel 266A at Durant as the community's first local aural transmission service. Channel 225C2 can be substituted at Cleveland in compliance with the Commission's minimum distance separation requirements at the petitioner's licensed site.[9] Channel 292A can be substituted at Belzoni in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.4 kilometers (5.2 miles) southeast.[10] We will order that a filing window be opened for Channel 292A at Belzoni.[11] Channel 266A can be allotted to Durant in compliance with the Commission's minimum distance separation requirements with a site restriction of 1.0 kilometers (0.6 miles) north.[12] As requested, we also modify Station WDTL-FM's license to specify operation on Channel 225C2 at Cleveland.

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 21, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Cleveland, Mississippi	225C2, 252C3, 280C3
Belzoni, Mississippi	292A, 296A
Durant, Mississippi	266A

9. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Delta Radio, Inc., for Station WDTL-FM, Cleveland, Mississippi, IS MODIFIED to specify operation on Channel 225C2, in lieu of Channel 224A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

---

[8] Delta notes that Scott has elected not to proceed with the construction of a Class A facility at Belzoni, Mississippi, and has requested the cancellation of Station WJSJ(FM)'s construction permit. Scott also advised the Commission that he had no objection to the deletion of Channel 225A at Belzoni. Scott's request for the cancellation of Station WJSJ(FM)'s construction permit was granted on May 6, 1993.

[9] The coordinates for Channel 225C2 at Cleveland are North Latitude 33-45-12 and West Longitude 90-42-45.

[10] The coordinates for Channel 292A at Belzoni are North Latitude 33-08-06 and West Longitude 90-24-58.

We note that the coordinates for Channel 292A at Belzoni are short-spaced to Station WLTD(FM), Channel 292A, Lexington, Mississippi. However, the license for Station WLTD(FM) was modified to specify operation on Channel 290C2 at Pickens, Mississippi, in the context of MM Docket No. 91-183. *See* 6 FCC Rcd 5559 (1991). Our records reveal that Station WLTD(FM)'s construction permit (File No. BPH-920228IM) for Channel 290C2 at Pickens was modified on September 21, 1993. Therefore, the issuance of a license for a station on vacant Channel 292A at Belzoni, may be withheld until Station WLTD(FM) is licensed on Channel 290C2 at Pickens. We will serve the licensee of Station WLTD(FM) with a copy of this *Report and Order*.

[11] We note that Channel 225A was allotted to Belzoni in MM Docket No. 84-231. *See* 50 FR 3514, January 25, 1985. Scott, holder of the construction permit for Channel 225A, filed a letter with the Commission on October 5, 1992, stating that he did not intend to build a facility at Belzoni. His construction permit for Channel 225A was thereafter cancelled. *See supra* n.8. Therefore, a new filing window will be opened by this *Order*.

[12] The coordinates for Channel 266A at Durant are North Latitude 33-05-00 and West Longitude 89-51-00.

10. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, **if the request is granted**, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Delta Radio, Inc., licensee of Station WDTL-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

11. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the following:

J. Scott Communications, Inc.

4519 Radnor Road

Indianapolis, Indiana 46226

(Licensee of Station WLTD(FM))

12. The window period for filing applications for Channel 292A at Belzoni, Mississippi, and for Channel 266A at Durant, Mississippi, will open on **October 24, 1994**, and close on **November 21, 1994**.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-228

In the Matter of

Amendment of Section 73.202(b), RM-8295
Table of Allotments,
FM Broadcast Stations.
(Tawas City, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 30, 1994; Released: September 7, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 5217 (1993), issued in response to a petition filed by Ives Broadcasting, Inc. ("Ives"), proposing the substitution of Channel 291A for Channel 297A at Tawas City, Michigan. Ives also requested modification of its license for Station WDBI-FM, Channel 297A, to specify operation on Channel 291A.[1] Ives filed supporting comments in which it reaffirmed its interest in the channel. Patricia Mason ("Mason") filed comments. Ives and Mason filed reply comments.

2. Ives submitted comments supporting the allotment of Channel 291A at Tawas City. Ives indicates that it is precluded from operating on six kilowatts on Channel 297A at its licensed site as it is short spaced to a Canadian Channel 297C allotment at Sault Ste. Marie, Ontario. According to Ives, the short spacing results from the adoption of the increased separation distances for Class A stations in the *Second Report and Order*, MM Docket 88-375, 4 FCC Rcd 6375 (1989).

3. Mason filed comments stating her intention to file an application for Channel 291A at Tawas City. Mason contends that although Ives states the reason for requesting a channel change is to increase operating power from three to six kilowatts, in reality Ives is using this approach to secure a Class C3 facility. Although Ives claims it is precluded from increasing power because of a short spacing to a Canadian allotment, Mason contends that Ives can increase its power on Channel 297A by moving its present site by an additional 4.29 kilometers. Mason states that Ives has not sought modification of its license to specify the new channel since it is not an adjacent channel upgrade and, therefore, Channel 291A must be made available for application.

4. Ives, in reply to Mason's comments, argues that no evidence has been provided by Mason that a new site is available for Channel 297A at six kilowatts which meets zoning and building requirements. Ives contends that it has provided a channel that is useable at its current tower location which is in full compliance with all FCC Rules and environmental requirements and will provide improved service to the community. Ives states that in its petition for rule making it had mentioned cases in support of its request to which Mason has attempted to downplay Ives further states that what is important to recognize in each of the cited cases is that a channel substitution was permitted to relieve a technical barrier to improved service. Finally, Ives contends that Mason has misread the petition and the *Notice* as both requested modification of its license for Station WHST(FM) to specify operation on Channel 291A.

5. Mason filed reply comments restating her intention to apply for Channel 291A if allotted to Tawas City. Mason continues to believe Ives can achieve its goal by relocating its transmitter site for Channel 297A which leaves Channel 291A available for application.

6. After a review of the comments filed in this proceeding, we believe the public interest will be served by the substitution of Channel 291A for Channel 297A at Tawas City, Michigan, since it will provide improved service to the community. Channel 291A can be allotted to Tawas City in compliance with the Commission's minimum distance separation requirements at Ives' specified site.[2] Since Tawas City is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment. In accordance with Ives' request, we shall modify its license to specify operation on Channel 291A. The procedures outlined in *Modification of FM & TV Licenses*, 98 FCC 2nd 916 (1984), and Section 1.420(g) of the Commission's Rules, do not apply in this case since no upgrade in facilities is contemplated. We believe Channel 291A is equivalent to Channel 297A at Tawas City for allotment purposes. We consider channels of the same class to be equivalent unless showings have been made that a station cannot be constructed for reasons such as environmental consequences or air hazards. *See Ver o Beach, Florida*, 3 FCC Rcd 1049 (1988), *rev. denied*, 4 FCC Rcd 2184, 2185 (1989). Since Ives has not requested the substitution of a Class C3 facility at Tawas City, there is no reason to address Mason's comments concerning possible future modification plans for Station WHST (FM). In response to Mason's expression of interest for an additional FM channel in Tawas City, a staff analysis was initiated to determine if another channel was available for allotment. Our analysis indicates Channel 277A can be allotted to Tawas City in compliance with the Commission's spacing requirements provided there is a site restriction 4.8 kilometers (3 miles) north of the community.[3] The site restriction will prevent a short spacing to the vacant allotment site for Channel 279C2, Station WFMM, Harbor Beach, Michigan. Canadian concurrence has been obtained for this allotment. It should be noted that Commission Rules do not contem-

[1] The call letters of Station WDBI-FM were changed to WHST(FM), effective August 1, 1993. Public notice was given August 6, 1993 (Report No. 211).

[2] The coordinates for Channel 291A at Tawas City are 44-16-27 North Latitude and 83-39-42 West Longitude.

[3] The coordinates for Channel 277A at Tawas City are 44-18-40 North Latitude and 83-31-00 West Longitude.

plate the filing of expressions of interest in proceedings, such as this one, which seek to make equivalent channel substitutions. However, since another channel is available, we do not believe that issuance of a new *Notice of Proposed Rule Making*, with its attendant use of administrative resources and delay in initiating new service, would serve the public interest.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 21, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Tawas City, Michigan	277A, 284C2, 291A

8. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the License of Station WHST(FM), IS MODIFIED, to specify operation on Channel 291A subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License BMLH-900509KD except for the channel as specified above. Any changes, except those specified, require prior authorization pursuant to an application for construction permit. (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BMLH-900509KD, except for the channel as specified above, and a license application (Form 302) is filed within 10 days of commencement of program tests.

9. The window period for filing applications for Channel 277A at Tawas City, Michigan, will open on **October 24, 1994**, and close on **November 21, 1994**.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-39

In the Matter of

Amendment of Section 73.202(b), RM-8452
Table of Allotments,
FM Broadcast Stations.
(Roseau, Minnesota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 30, 1994; Released: September 7, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 9 FCC Rcd 2195 (1994), proposing the allotment of Channel 278C2 to Roseau, Minnesota, as that community's second FM broadcast service. The *Notice* was issued in response to a petition filed by Robert M. Obie ("petitioner"). Petitioner filed comments supporting the allotment of Channel 278C2 to Roseau and stated his intention to file an application for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 278C2 to Roseau, Minnesota, in order to provide the community with a second FM broadcast service. As indicated in the *Notice*, Channel 278C2 can be allotted to Roseau in compliance with the Commission's spacing requirements at the city reference coordinates.[1] Since Roseau is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective October 21 , 1994, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Roseau, Minnesota	271C2, 278C2

4. The window period for filing applications for Channel 278C2 at Roseau, Minnesota, will open on **October 24, 1994**, and close on **November 21, 1994**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 278C2 at Roseau are 48-50-46 and 95-45-45.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-283

In the Matter of

Amendment of Section 73.202(b), RM-8374
Table of Allotments,
FM Broadcast Stations.
(Pillager, Minnesota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 30, 1994; Released: September 7, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 8 FCC Rcd 8148 (1993), issued in response to a petition filed by NorMin Broadcasting Co. ("petitioner"). The *Notice* proposed the allotment of Channel 240A to Pillager, Minnesota, as that community's first local aural transmission service. Petitioner filed comments reaffirming its interest in the allotment of Channel 240A at Pillager. No other comments were received.

2. We believe the public interest would be served by allotting Channel 240A to Pillager, Minnesota, as it will provide the community with its first aural transmission service. Channel 240A can be allotted to Pillager consistent with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 9.2 kilometers (5.7 miles) southeast of the community.[1] The site restriction will prevent a short spacing to Station WJJY-FM, Channel 294C1, Brainerd, Minnesota. Since Pillager is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 21, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Pillager, Minnesota	240A

4. The window period for filing applications for Channel 240A at Pillager, Minnesota, will open on **October 24, 1994**, and close on **November 21, 1994**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 240A at Pillager are 46-14-59 and 94-26-33.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-24

In the Matter of

Amendment of Section 73.202(b), RM-8440
Table of Allotments,
FM Broadcast Stations.
(Bozeman, Montana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 30, 1994; Released: September 7, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 9 FCC Rcd 1541 (1994), proposing the allotment of Channel 278C1 to Bozeman, Montana, as that community's fifth FM broadcast service. The *Notice* was issued in response to a petition filed by William R. Reier, Jr. ("petitioner"). Petitioner filed comments reiterating his intention to apply for the channel.

2. We believe the public interest would be served by allotting Channel 278C1 to Bozeman, Montana, since it would provide the community with additional broadcast service. As indicated in the *Notice*, Channel 278C1 can be allotted to Bozeman in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 21, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Bozeman, Montana	229C1, 236C1
	260C1, *271C2, 278C1

4. The window period for filing applications for Channel 278C1 at Bozeman, Montana, will open on **October 24, 1994**, and close on **November 21, 1994**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 278C1 at Bozeman are 45-40-47 and 111-02-16.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-17

In the Matter of

Amendment of Section 73.202(b), RM-8437
Table of Allotments,
FM Broadcast Stations.
(Jefferson City, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 31, 1994; Released: September 7, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 9 FCC Rcd 1266 (1994), proposing the allotment of Channel 281A to Jefferson City, Missouri, as that community's third FM broadcast service. The *Notice* was issued in response to a petition filed by Richard L. Billings ("petitioner"). Petitioner filed comments reiterating his intention to apply for the channel. No other comments were received.

2. We believe the public interest would be served by allotting Channel 281A to Jefferson City, Missouri, since it would provide the community with additional broadcast service. As indicated in the *Notice*, Channel 281A can be allotted to Jefferson City in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 1.5 kilometers (.9 miles) southwest of the community.[1] The site restriction will prevent a short spacing to Station WKKX, Channel 281C2, Jerseyville, Illinois.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 21, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Jefferson City, Missouri	261C2, 281A, 295C

4. The window period for filing applications for Channel 281A at Jefferson City, Missouri will open on **October 24, 1994**, and close on **November 21, 1994**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 281A at Jefferson City are 38-34-00 and 92-11-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-49

In the Matter of

Amendment of Section 73.202(b),	RM-8446
Table of Allotments,	
FM Broadcast Stations.	
(Commerce, Oklahoma and	
Neosho, Missouri)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 31, 1994; Released: September 7, 1994

By the Acting Chief, Allocations Branch:

1. In response to a petition filed by KBTN, Inc. ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 9 FCC Rcd 2604 (1994), proposing the allotment of Channel 259A to Neosho, Missouri, as that community's first local FM broadcast service. The *Notice* specified that to accommodate petitioner's proposal, it would be necessary to delete vacant Channel 259A at Commerce, Oklahoma, or in the event an expression of interest was filed for a channel at Commerce during the comment period in this proceeding, to substitute Channel 282A for Channel 259A at Commerce.[1] Petitioner filed comments in support of its proposal. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 259A at Neosho, Missouri, since it will provide the community with its first local FM broadcast service. Channel 259A can be allotted to Neosho, Missouri, in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules provided there is a site restriction 10 kilometers (6.2 miles) south of the community.[2] The site restriction will prevent a short spacing to Station KHST, Channel 260A, Lamar, Missouri. Since no comments were filed in response to the *Notice* supporting retention of a channel in Commerce, we shall delete Channel 259A at Commerce to accommodate the allotment of Channel 259A at Neosho.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 21, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Neosho, Missouri	259A

4. The window period for filing applications for Channel 259A at Neosho, Missouri, will open on **October 24, 1994**, and close on **November 21, 1994**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The construction permit held by Commerce Communications, Inc., for Channel 259A at Commerce expired on August 14, 1990, and was cancelled on June 12, 1992.

[2] The coordinates for Channel 259A at Neosho are 36-46-56 and 94-23-17.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT
COMMUNICATIONS COMPANY,
Complainant,

v. File No. E-87-033

AMERICAN TELEPHONE &
TELEGRAPH COMPANY,
Defendant.

MUTUAL OF OMAHA INSURANCE CO.,
Complainant,

v. File No. E-87-057

AMERICAN TELEPHONE &
TELEGRAPH COMPANY,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: June 13, 1994; Released: September 8, 1994

By the Commission: Commissioners Ness and Chong not participating.

I. INTRODUCTION

1. Before the Commission are two Applications for Review filed by US Sprint Communications Company (US Sprint) and Mutual of Omaha Insurance Co. (Mutual) (together the "Complainants"). Both US Sprint and Mutual seek reversal of an April 13, 1988 ruling[1] by the Chief, Common Carrier Bureau (Bureau) finding that portions of the complainants' claims against American Telephone & Telegraph Company (AT&T) are barred by the applicable statute of limitations contained in Section 415(b) of the Communications Act of 1934, as amended (the "Act").[2] The Bureau dismissed complainants' claims for damages for their payment of alleged unjust and unreasonable charges for AT&T's 56 kilobits per second (kbps) digital dataphone service (DDS) to the extent the complainants alleged that they incurred the charges beyond the two-year statute of limitations - that is, more than two years before they filed their complaints with the Commission. For the reasons set forth below, the applications for review are denied.

II. BACKGROUND

2. At issue in these proceedings are the rates US Sprint and Mutual paid for AT&T's 56 kbps DDS services during the period January 1, 1982 through April 24, 1985.[3] In their original complaints, the complainants relied primarily on a Bureau decision which granted a complaint filed by GTE Telenet Communications Corporation (Telenet) challenging the reasonableness of AT&T's 56 kbps DDS rates.[4] Complainants alleged that they were similarly situated users of AT&T's 56 kbps DDS services[5] during the relevant time period and, therefore, were entitled to damages based on the same findings and conclusions reached in the Telenet proceeding. Complainants acknowledged that they were billed for the services complained of more than two years before they filed their complaints with the Commission. They contended, however, that their claims were timely filed because their cause of action against AT&T did not accrue and the statute of limitations did not begin to run until either May 26, 1986, the date the Bureau released the *Telenet Order*, or, at the earliest, November 27, 1985, the date AT&T submitted certain data regarding the rates for its 56 kbps services in response to a request by the Bureau in the Telenet proceeding. Complainants argued that given AT&T's unreasonable delay in revising its DDS rates and the Commission's own inability to prescribe cost-justified rates, they were not aware and had no prior basis for complaining that AT&T's 56 kbps rates were unlawful. The complainants also argued that the statute of limitations was effectively tolled because AT&T deliberately acted to fraudulently conceal the nature of its excessive 56 kbps rates. Complainants alleged that because of AT&T's actions, they had no way of knowing that the 56 kbps rates were excessive until information become publicly available in the Telenet proceeding.

3. In granting AT&T's motion to dismiss part of complainants' claim as beyond the statute of limitations, the Bureau rejected complainants' theory that the statutory

---

[1] Aetna Life Insurance Company, *et al.* v. AT&T, 3 FCC Rcd 2126 (1988) (*Limitations Order*); *Erratum*, 3 FCC Rcd 2576 (1988).

[2] 47 U.S.C. § 415(b). Section 415(b) states:

> All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to section (d) of this section.

[3] In its original complaint, filed January 2, 1987, US Sprint requested damages for the "unjust and unreasonable" rates it alleged it paid for AT&T's DDS services during period January 1, 1982 through June 30, 1986. In its complaint, filed April 24, 1987, Mutual sought damages based on the "excessive" rates it claims it paid for the services from January 1, 1982 through the date it filed the complaint. The parties have settled those portions of the complainants' claims that fell within the two year limitations period. *See* US Sprint Communications Co. v. AT&T, 3 FCC Rcd 6644 (Com. Car. Bur. 1988); Mutual of Omaha Insurance Co. v. AT&T, 4 FCC Rcd 53 62 (Com. Car. Bur. 1989).

[4] GTE Telenet Communications Corp. v. AT&T Mimeo No. 4755 (released May 29, 1986) (*Telenet Order*). The *Telenet Order* was subsequently vacated by the Bureau at the request of Telenet and AT&T as part of a mutual settlement and release of all claims and controversies. *Order*, 1 FCC Rcd 347 (Com. Car. Bur. 1986).

[5] For a detailed discussion of the history surrounding AT&T's DDS offerings, *see Limitations Order*, 3 FCC Rcd at 2126, paras 2-8.

period did not commence until May 26, 1986 (the release date of the *Telenet Order*). The Bureau found that the *Telenet Order* was not a prerequisite to a claim for reimbursement for excessive charges and that applicants could have brought their claims within the statutory period on the same basis as Telenet had in its complaint. The Bureau further held that complainants had failed to sustain their burden of proof with regard to their claims of fraudulent concealment. Finding that the allegations of fraudulent concealment were general, conclusory and not supported by the record, the Bureau further held that complainants had failed to sustain their burden of proof with regard to these claims.

III. APPLICATIONS FOR REVIEW

4. In its application for review, US Sprint contends that the Bureau's ruling is erroneous under the law and contrary to Commission and judicial precedent; is based on contradictory factual matters; and fails to accord complainants due process of law.[6] In its application for review, Mutual contends that the *Limitations Order* erroneously concludes that Mutual had a sufficient basis to bring its complaint prior to April 24, 1985.[7] Both US Sprint and Mutual argue that the Bureau itself recognized that no basis existed for earlier-filed complaints when it dismissed Telenet's claim for damages stemming from AT&T 56 kbps rates in effect prior to January 1, 1982. The complainants state that in dismissing Telenet's claims, the Bureau specifically rejected Telenet's reliance on the AT&T cost data compiled using a cost allocation methodology previously rejected by the Commission as unacceptable.[8]

5. Finally, Mutual contends that Commission decisions in a number of rate of return complaint proceedings[9] directly contradict the Bureau's ruling in the instant complaints. Mutual claims those orders held that the statute of limitations for claims alleging a violation of the Commission's rate of return prescription did not begin to run until the carrier had submitted reliable reports to the Commission showing that it has earned an excessive rate of return.[10]

6. In opposing the applications for review, AT&T maintains that the Bureau correctly held that complainants' cause of action accrued as early as 1981, when sufficient facts were publicly available to enable complainants to assert a claim. AT&T further states that the *Telenet Order*, upon which applicants partially rely as first providing a cause of action, has no current force or effect because it has been vacated by the Bureau. Even were this not the case, AT&T avers, the *Telenet Order* would not change the fact that all relevant information regarding its 56 kbps rates and practices was publicly available prior to 1982.

7. AT&T also contends that the Bureau correctly found that AT&T neither had any affirmative duty to disclose additional information nor failed to provide information it was required to provide.[11] AT&T further points to the public availability of the complete history of its DDS rates from their inception, including AT&T's efforts at cost justification, as evidence that no concealment was involved.

8. Finally, in response to Mutual's November 22, 1989 letter, AT&T argues that Mutual's reliance on the MCI/AT&T *Liability Orders* to buttress its statute of limitations argument in the present case is misplaced.[12] In those orders, AT&T argues, the Commission emphasized that the defendant local exchange carriers were under an affirmative obligation to target their return levels to a specified rate, and were required to file detailed rate of return reports at the close of specified monitoring periods. In the instant case, AT&T claims that it was under no obligation to target individual rates to specific return levels and had no duty to report its earnings from individual rate elements. Thus, according to AT&T, the cases are clearly distinguishable as a matter of law.

IV. DISCUSSION

9. We have carefully reviewed the Bureau's *Limitations Order* and the arguments of the parties and find that, in dismissing, in part, the claims of US Sprint and Mutual as barred by Section 415(b), the Bureau correctly applied Commission and court precedent.

10. As the Bureau noted in the *Limitations Order*, an important purpose of the two-year statute of limitations contained in Section 415 of the Act is to protect potential defendants against liability for stale claims. The Bureau also correctly noted that except under narrow circumstances, such as fraudulent concealment, once the prescribed time period for filing complaints to recover unlawful charges or damages has elapsed, any opportunity for such recovery is lost without recourse.[13] In the instant case, the Bureau found that Section 415 operated to bar a portion of the complainants' claims because the cause of action alleged in the complaints accrued as early as 1981 when sufficient information regarding AT&T's DDS tariff rates became publicly available.

---

[6] US Sprint Application for Review at 2.

[7] Mutual Application for Review at 4.

[8] Telenet's November 25, 1981 complaint relied upon cost data submitted by AT&T in 1978 and 1980 using a fully distributed costing methodology (FDC-7) and the cost of service records system (COSRS), respectively. The Commission subsequently found both of these methods to be unacceptable as applied by AT&T in its cost studies. *See* American Telephone and Telegraph Company (Manual and Procedures for the Allocation of Costs), 84 FCC 2d 384, 390 (1981) (*ICAM Order*), *aff'd sub nom.* MCI Telecommunications Corp. v. FCC, 675 F.2d 408 (D.C. Cir. 1982). The Commission then prescribed the interim cost allocation manual based upon a generalized relative use methodology. Complainants claim that had they submitted complaints prior to the availability of data based on a Commission-sanctioned cost allocation methodology, their complaints, as Telenet's, would have been dismissed for lack of acceptable evidence.

[9] MCI Communications Corp. v. Pacific Northwest Bell Telephone Co., *et al.*, 5 FCC Rcd 216 (1989) and AT&T Communications v. Northwestern Bell Telephone Co., 5 FCC Rcd 143 (1989) (*MCI/AT&T Liability Orders*).

[10] This argument was presented in a letter to the Commission dated November 22, 1989. In its letter Mutual requested permission to file its letter. By letter dated January 2, 1990, AT&T responded to Mutual's letter. While such filings are not contemplated by the Commission's rules, we grant Mutual permission to file its letter and also accept AT&T's responsive letter in order to ensure a complete record in this matter.

[11] AT&T Opposition at 15.

[12] AT&T's January 2, 1990, letter at P. 2.

[13] Limitations Order, 3 FCC Rcd at 2129, citing, *inter alia*, Bunker Ramo Corp, 31 FCC 2d 449, 453 (1971) (*Bunker Ramo*); Armstrong Utilities Inc. v. General Telephone Co. of Pennsylvania, 25 FCC 2d 385 (1970).

11. The complainants' claim that the statute of limitations did not begin to run until AT&T's release of data during the Telenet proceeding in November, 1985, or until the Commission's release of the *Telenet Order* itself in May of 1986, is unavailing. Complainants have failed to persuade us that prior to these dates they could not have established a viable cause of action against AT&T based upon its DDS rates. On the contrary, we agree with the Bureau that sufficient information regarding AT&T's DDS rating practices was publicly available prior to these dates for complainants to establish a credible claim as Telenet did in its complaint. In the *ICAM Order*, for example, which was released in January 1981, 10 months prior to the time Telenet filed its complaint, the Commission specifically called into question the reasonableness of AT&T's private line rates. In that decision, the Commission explained in detail its reasons for disallowing the method used by AT&T to derive its private line rates and made it clear that AT&T's private line services, including DDS, were not bearing their full cost burden. *See ICAM Order*, 84 FCC 2d at 403. In directing AT&T to employ a different allocative method,[14] the Commission made it abundantly clear that it expected AT&T to set its private line rates to recover that service category's full share of costs. *Id.* at 400-403. Contrary to complainants' claim, the information provided by AT&T in November 1985 did not raise for the first time questions regarding the reasonableness of AT&T's DDS rating practices, nor can it be said that AT&T's data submission in response to the Bureau's request constituted notice that AT&T's DDS rates were flawed.

12. In view of Commission rulings regarding AT&T's private line rate structure and the substantial amount of information and associated cost data pertinent to DDS filed with the Commission by AT&T during the 1977-1982 time period, we are persuaded that complainants had the same opportunity Telenet had to challenge AT&T's DDS rates. It should be emphasized that to bring a Section 208 claim, a complainant need not show or allege direct damages in its complaint but only set forth facts which, if true, would establish a violation by the defendant.[15] Thus, even though reliable rate of return data may not have been available for particular rate elements or categories to help quantify potential damages, the complainants had the opportunity to show that the rates were unreasonable, or unreasonably discriminatory, pursuant to Section 201(b) or 202(a) of the Act, 47 U.S.C. § 201(b) or 202(a).[16]

13. We turn now to the complainants' claim that AT&T fraudulently concealed material facts regarding its DDS rates. US Sprint contends that the *Limitations Order* failed to consider the full extent of its argument that AT&T's delay in filing cost-justified rates from 1977 to 1985 in itself constituted fraudulent or wrongful concealment. The Bureau, in finding that complainants had not met their burdens on this issue, stated that they had failed to show that defendant knowingly concealed facts prerequisite to establishing a cause of action or otherwise contrived to create the appearance that the rates were reasonable.[17] The crux of complainants' arguments on review is that AT&T's unexplained and protracted delay in filing cost-based DDS rates effectively concealed the fact that the 56 kbps DDS channel rates were excessive. Complainants contend that AT&T, through its actions, actively or fraudulently concealed from complainants and others the basis for a cause of action.[18] Complainants argue that the Bureau's reasoning was faulty, especially insofar as it assumed that the complainants were required to make the combined showing that due diligence would not have revealed a cause of action and that AT&T had engaged in unlawful concealment.[19] By making one a condition precedent to and dependent upon the other, according to complainants, the Bureau misconstrued *Bunker Ramo*, which complainants argue established that active or fraudulent concealment forms a separate and independent basis for tolling the statute of limitations.

14. We reject complainants' claims that the Bureau's determination that there was no fraudulent concealment was based solely upon a finding that a cause of action could have been discovered in a timely fashion based upon publicly available information regarding AT&T's rates. The Bureau, rather, found insufficient evidence to support the complainants' claim that AT&T knowingly or willfully concealed facts surrounding its 56 kbps rates. There was no evidence, for example, that AT&T refused to provide information upon request, failed to meet specific deadlines for submission of information, or took actions to evade or impede progress toward discovering or revealing information pertinent to resolution of the DDS rate issue. During the time period relevant to the complaint, AT&T was continually engaged in satisfying massive cost data and related information requests emanating from numerous Commission proceedings, as described in the *Limitations Order*. All of these had potential material impact on DDS and other AT&T rates. We are not persuaded, therefore, that because rates found to be unjustified remained in effect over a protracted time period AT&T was guilty of fraudulent or otherwise unlawful concealment.

---

[14] Specifically, the Commission directed AT&T to employ an allocative method based on relative use, as reflected in the ICAM. *Id.* at 403.

[15] *See* 47 U.S.C. § 208.

[16] Section 201(b) states in part:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful...

Section 202(a) states:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

[17] *Limitations Order*, 3 FCC Rcd at 2128, *citing, inter alia*, Rutledge v. Boston Hose & Rubber Co., 576 F.2d 248 (9th Cir. 1978).

[18] US Sprint Application for Review at p. iii.

[19] *Id.* at Section II.A.

15. US Sprint argues, additionally, that the very effectiveness of the tariffs coupled with AT&T's representation to the public that the rates were lawful further impaired the public's ability to discover relevant facts. It is difficult to conceive that rates filed in public tariffs can be conducive to any form of concealment. Tariffed rates permitted by the Commission to take effect without suspension or investigation are subject to challenge at any time by either members of the public or the Commission itself, through petition, complaint or investigation.

16. We also reject Mutual's claim that the Bureau erred by failing to find that AT&T's failure to settle with it on the same terms and conditions as it did with Telenet resulted in an unreasonable preference or advantage to Telenet in violation of Section 202(a) of the Act.[20] The Commission's policy is to encourage carriers and their customers to settle disputes over rates and practices outside of the often costly and time consuming complaint process.[21] Any requirement that carriers electing to settle a dispute with one complainant must settle on the same terms with another complainant asserting a similar, but independent cause of action, would effectively nullify this important Commission policy.

17. Finally, we find no merit in Mutual's argument that the Commission's holding in the *MCI/AT&T Liability Orders* is applicable to this proceeding. In those proceedings, the Commission emphasized that Section 65.102(b) of the Commission's rules, 47 C.F.R. Section 65.102(b), places affected carriers under an ongoing obligation to file monitoring reports reflecting their earned rate of return for interstate access services (FCC Form 492) at the end of specified monitoring periods. These reports, by Commission design, are dispositive of a carrier's actual rate of return *vis a vis* a prescribed rate. The Commission reasoned that no useful purpose would be served by requiring complainants to speculate on such return levels when the actual return will be known at a time certain. In the instant case, AT&T was under no similar obligation to file reports showing its return levels on 56 kbps service. A prospective complainant was therefore required to discover sufficient information to establish a cause of action.

V. CONCLUSION AND ORDERING CLAUSE

18. For the above reasons, we find both the rationale and result of Bureau's rulings to be correct.

19. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 115(g) of the Commission's rules, 47 C.F.R. § 115(g), that the Applications for Review filed by US Sprint Communications Company and Mutual of Omaha Insurance Co. on May 16, 1988 and May 17, 1988, respectively, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[20] *See Limitations Order*, 3 FCC Rcd at 2128, para. 9, n.29.
[21] Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in Which the Commission is a Party, 6 FCC Rcd 5669, 5670 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Reconsideration

BARDEN CABLEVISION

of Certification of
Detroit Cable Communications
Commission (MI1039)
to Regulate Basic Cable Rates

MEMORANDUM OPINION AND ORDER

Adopted: August 31, 1994; Released: September 1, 1994

By the Chief, Cable Services Bureau:

INTRODUCTION

1. On November 16, 1993, Barden Cablevision ("Barden") filed a timely Petition for Reconsideration challenging the certification of the Detroit Cable Communications Commission ("Detroit") to regulate the cable system's basic cable rates in Detroit, Michigan. Detroit opposes Barden's petition and Barden has filed a reply. In response to a Commission letter dated July 22, 1994, Barden has submitted additional information regarding its subscribership. In turn, Detroit filed comments to Barden's response.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.[1] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition.[2] Such certification becomes effective within 30 days of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[3] Cable operators may file petitions for reconsideration of the franchising authority's certification within 30 days of the effective date of such certification.[4] Regulation of rates is automatically stayed pending review of a timely filed petition for reconsideration alleging effective competition.[5]

ARGUMENTS OF THE PARTIES

3. Barden argues that its system serving the City of Detroit is not subject to rate regulation because the system faces effective competition. Specifically, it argues that, as of November 4, 1993, it served a total of 115,390 subscribers. This number is based on the total number of subscribers (118,643) less the total number of subscribers desiring that their cable service be disconnected (2,570) and the number of commercial subscribers (683).[6] In addition, Barden claims that there are 410,0270 "households" within its franchise area.[7] This number is based on the number of "housing units" within the city according to the 1990 Census. Based on these figures, Barden argues that its penetration level is only 28.1%. Thus, Barden argues that since it serves fewer than 30% of the households within its franchise area, it is subject to effective competition as defined by Section 623(l)(1)(A) of the Communications Act.[8] Thus, Barden concludes that its system is not subject to rate regulation.

4. In opposition, Detroit argues that Barden has failed to demonstrate that it calculated its penetration level in a manner that is consistent with the Commission's Rules. First, Detroit argues that Barden's calculation of the number of subscribers is not in accordance with the Commission's Rules. Specifically, it argues that Barden has not demonstrated that its number of subscribers has been calculated to include all residences in a multiple dwelling building if they are billed as a single customer. In addition, Detroit argues that Barden inappropriately deducted the number of subscribers desiring disconnection from its total number of subscribers. It states that this deduction has no basis in the 1992 Cable Act or the Commission's Rules and that since these households were subscribers as of November 4, 1993, they were indeed "subscribers" to its cable service.[9]

---

[1] *See* 47 U.S.C. § 543(a)(4).

[2] *See* 47 C.F.R. §§ 76.906, 76.910(b)(4).

[3] *See* 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: 1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; 2) the franchising authority lacks the legal authority to adopt, or the personnel to administer, rate regulations; or 3) procedural laws and regulations applicable to rate regulation proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties. 47 U.S.C. § 543(a)(4).

[4] 47 C.F.R. §§ 1.106, 76.911. *See also Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*).

[5] 47 C.F.R. § 76.911(c).

[6] In its response to our July 22, 1994, request for additional information, Barden submitted a copy of its subscriber report which reflects the number of subscribers as of November 4, 1993. In addition, Barden's petition includes a declaration dated November 15, 1993, from John D. Rawcliffe, Vice President and General Manager of Barden Cablevision, who explains how the total net number of subscribers (115,390) was calculated.

[7] In support of its household data, Barden submits a copy of the relevant page from the 1990 Census Data which reflects that there are 410,027 housing units in Detroit. Bureau of the Census, U.S. Dept. of Commerce, 1990 CPH-2-24, 1990 Census of Population and Housing, Michigan, Table 10, at 70. Barden also claims that its own database shows that there are a total of 422,724 "residential units" in the Detroit franchise area. However, Barden submits no evidence as to how many of these "residential units" are actually households.

[8] This section defines effective competition as being present where "fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system." 47 U.S.C. § 543(l)(1)(A).

[9] Detroit agrees with Barden's position that commercial subscribers should not be counted for purposes of determining effective competition.

5. Next, Detroit argues that Barden inappropriately relies on the number of "housing units" rather than the number of "households" to measure its penetration level. Specifically, Detroit notes that Congress set forth the "effective competition" test in terms of "households," not "housing units." It argues that the term "household" is commonly defined as "those who dwell under the same roof and compose a family"[10] and that this definition is identical to the definition of household used in the 1990 Census.[11] If Congress intended the effective competition test to be measured based on the number of "housing units," argues Detroit, it would have employed that term. Moreover, Detroit argues, that the use of the common meaning of "household" is consistent with the intent of the "effective competition" standards. It states that the percentage of households subscribing to a system is intended to measure the level of competition faced by a cable system. It argues that the principal competition between cable companies and their competitors is to provide service to occupied dwelling units. Thus, Detroit claims that Congress intended that "effective competition" in the 1992 Cable Act would be measured by the number of households (that is, occupied housing units) and not the total number of housing units. Relying on household data from the 1990 Census, Detroit argues that there are 374,057 households within Barden's franchise area.[12] Assuming arguendo that Barden properly calculated its number of subscribers, Detroit argues that Barden's penetration level is actually 31.53% (117,960 subscribers divided by 374,057 households).[13]

6. In its reply, Barden claims that it counted multiple dwelling units in accordance with our rules. It also reiterates its belief that pending disconnects should be excluded from its subscriber count as they have affirmatively indicated their desire to cease being subscribers. Specifically, it argues that as its future disconnects have voluntarily requested disconnection of their cable service and such disconnection will occur on a date certain, they should not be counted as subscribers for purposes of effective competition. Barden believes that the fact that, as of November 4, 1993, these subscribers had not been physically disconnected from the cable service is immaterial. Nonetheless, it argues that even if pending disconnects are included within its subscriber count, its penetration level remains below 30%. Next, Barden argues that the adoption of the Census Bureau's definition for households is inappropriate. Rather, it argues that the appropriate measure of households for purposes of the effective competition tests is the number of homes passed or the number of housing units within the franchise area.[14]

DISCUSSION AND DECISION

7. We find that Barden has failed to meet its burden of rebutting the presumption that its system is not subject to effective competition.[15] Initially, Barden inappropriately deducted the number of subscribers desiring to be disconnected from its total number of subscribers. At a minimum, in order to meet its burden of demonstrating the presence of effective competition, a cable operator must demonstrate the number of subscribers at or around the time certification became effective. For this purpose, Barden submitted evidence that it had a total of 118,643 subscribers as of November 4, 1993. We are unpersuaded by Barden's arguments regarding its deduction of subscribers who have merely requested disconnection of their cable service. As the 2,570 households desiring disconnection were still receiving cable service as of November 4, 1993, we see no reason why they should be deducted from the calculation of Barden's penetration level for purposes of determining effective competition.[16]

8. Next, we agree that Barden has inappropriately relied upon "housing unit" data, rather than "household" data in calculating its penetration. Barden's argument that a "homes passed" test or a "housing unit" test should be used in determining effective competition is inconsistent with the 1992 Cable Act. With respect to reliance on a "homes passed" test,[17] the Commission has stated previously that, "the substitution of a "homes passed" for "homes in the franchise area" test does not appear to be consistent with the plain language of the statute.[18] Moreover, as the Commission has stated recently,

---

[10] As support, Detroit cites to *Webster's Ninth New Collegiate Dictionary* (1985).

[11] The 1990 Census defines "households" as including only occupied housing units, while "housing units" includes both occupied and vacant units. *See* Bureau of the Census, U.S. Dept. of Commerce, 1990 CPH-2-24, 1990 Census of Housing, Population and Housing Charactertistics, Appendix B at B-1.

[12] As support, Detroit submits a copy of the relevant page from the 1990 Census, General Population Characteristics, which demonstrates that there are 374,057 households (that is, occupied housing units) in Detroit.

[13] This number is based on a total of 118,643 subscribers less 683 commercial subscribers.

[14] As support, Barden contends that the Commission's rules already require that multiple dwelling units billed as a single customer (regardless of occupancy) must be counted as subscribers. In addition, it argues that use of a "housing unit" or "homes passed" test for effective competition would be consistent with the Commission's decision in its horizontal ownership proceeding to measure the audience reach of a cable system on a "homes passed" test. *See Second Report and Order*, in MM Docket No. 92-264, 8 FCC Rcd 8565 (1993). Finally, Barden argues that, prior to the 1992 Cable Act, the Commission defined effective competition using a "homes passed" standard. These arguments lack merit. Barden does not point to any Commission rule which requires that vacant dwelling units be counted as subscribers. Moreover, the Section 613(f)(1)(A) refers to the number of subscribers any one person can "reach" through cable systems. 47 C.F.R. § 533(f)(1)(A). As the Commission explained, this language can be construed to mean the share of homes passed by a cable operator. *Second Report and Order*, at 8576. As noted below, no similar language exists with respect to the "low penetration" standard for measuring effective competition.

[15] *See* 47 C.F.R. § 76.911(b)(1).

[16] Moreover, if Barden were allowed to deduct its prospective disconnects from its number of subscribers, it would arguably have to add the number of prospective installations and reconnects to its subscriber count.

[17] The term "homes passed" means the number of homes a particular cable system has the technical ability to serve promptly if a potential customer orders service.

[18] *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 9 FCC Rcd 1164, 1180 (1994).

> [a]s used in the Cable Act, we presume that Congress did not intend "households" to have a different meaning than in the 1990 census that would include vacant units or even partial-year vacant units. In any event, to permit an operator to include dwelling units that are empty for a significant portion of the year in determining its penetration rate would eviscerate the validity of this measure as an indicator of the presence of effective competition. People who are not present cannot be presumed to be choosing local competitive alternatives.[19]

Thus, we find that Barden's effective competition claim is inappropriately based on the number of housing units within its franchise area. Accordingly, we find that Barden has failed to rebut the presumption that its system is not subject to effective competition. Thus, its petition is denied.

ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that the Petition For Reconsideration filed by Barden Cablevision challenging the certification of the Detroit Cable Communications Commission to regulate basic cable rates IS DENIED.

10. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

11. IT IS FURTHER ORDERED that Barden Cablevision SHALL FILE its rate justification on the appropriate forms within 30 days of the release date of this *Memorandum Opinion and Order* or 30 days from notice from the franchising authority that it is regulating rates, whichever is later.

12. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, 47 C.F.R. § 0.321.

13. Interested parties may direct any questions to Lisa M. Higginbotham, Cable Services Bureau, Consumer Protection Division at (202) 416-0856.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

[19] *Third Order on Reconsideration*, in MM Docket Nos. 92-266, 92-262, 59 FR 17,961, 17,962 (April 15, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 2, 1994

Comment Date: September 23, 1994
Reply Comment Date: October 7, 1994

ANNUAL UPDATES

COMMENTS INVITED ON DEPRECIATION RATE PRESCRIPTIONS PROPOSED FOR DOMESTIC TELEPHONE CARRIERS.

The Common Carrier Bureau invites comments on proposed depreciation rates for two local exchange carriers. The proposed depreciation rates for these carriers were developed as a result of the Commission's Order on Simplification of the Depreciation Prescription Process, Docket No. 92-296, released on June 28, 1994, which established ranges (projection life and future net salvage) for 22 plant categories. Under this approach price cap local exchange carriers scheduled for review in 1995 and 1996 were given the opportunity to file for changes in their depreciation rates for 1994 provided they use basic factors within the ranges the Commission adopted.

For those accounts that met the range criteria adopted by the Commission, these two carriers submitted studies proposing revised depreciation rates based upon the ranges. For the remaining accounts, the updated depreciation rates under consideration here represent updates for rates which were fully reviewed and discussed by the staffs of this Bureau and the respective state commissions and prescribed by this Commission in prior orders. Those previously prescribed rates have now been updated to reflect the accounting experience (i.e., plant additions and retirements and net salvage amounts) that occurred in 1992 and/or 1993, and the basic factors (projection lives and future net salvages) remain unchanged.

The Attachment lists the two carriers, and the affected jurisdictions. This Attachment also lists the proposed expenses and composite rates for the carriers, the current expenses and composite rates (developed using the currently prescribed depreciation rates and amortizations), and the percentage change in expenses (proposed vs. current). These expenses are estimated annual amounts and may not reflect actual expenses because January 1, 1994 plant balances are used and the proposed rates may not be applicable for the entire year.

Copies of the carriers' annual update depreciation rate study submissions and rate filings are available for public inspection in Suite 257, 2000 L Street, N.W., Washington, D.C. Copying facilities are available in Suite 812, 2000 L Street, N.W. Copies are also available from the International Transcription Service, Inc., Room 246, 1919 M Street, N.W., Washington, D.C.

Parties wishing to file comments on the proposals summarized herein may do so by **September 23, 1994**. Replies may be filed by **October 7, 1994**. Comments and reply comments should include in the caption a reference to file no. AAD # 114. A copy of the comments and replies should be provided to the Chief, Depreciation Rates Branch.

We will treat this proceeding as non-restricted for purposes of the *ex parte* rules. *See generally* 47 C.F.R. §1.1200-1.1216.

For additional information contact Ms. Fatina Franklin, Chief, Depreciation Rates Branch, 202-418-0840.

Attachment

FEDERAL COMMUNICATIONS COMMISSION

SUMMARY OF PROPOSED CHANGES IN ANNUAL DEPRECIATION EXPENSE BY JURISDICTION

Carrier - Jurisdiction	Investment	Annual Depreciation Expense and Composite Rate					
		Current		Proposed		Proposed Change	
		Expense	Percent	Expense	Percent	Expense	Percent
	($000)	($000)	(%)	($000)	(%)	($000)	(%)
BELL ATLANTIC-DC	1,221,592	99,517	8.1	102,940	8.4	3,423	3.4
BELL ATLANTIC-Virginia	4,708,128	365,864	7.8	371,270	7.9	5,406	1.5
BELL ATLANTIC-West Virginia	1,467,077	97,973	6.7	101,143	6.9	3,170	3.2
US WEST COMMUNICATIONS							
Idaho	744,888	50,119	6.7	53,415	7.2	3,296	6.6
Iowa	1,652,966	103,604	6.3	110,318	6.7	6,714	6.5
Minnesota	3,291,828	222,736	6.8	235,592	7.2	12,856	5.8
Montana	731,037	50,598	6.9	54,013	7.4	3,415	6.7
Oregon	1,985,807	137,629	6.9	151,809	7.6	14,180	10.3
TOTAL	15,803,323	1,128,040	7.1	1,180,500	7.5	52,460	4.7

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 30, 1994

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON CINCINNATI BELL AND NYNEX PETITIONS FOR WAIVER OF THE COMMISSION'S RULES FOR 500 ACCESS SERVICE

On August 17, 1994, Cincinnati Bell Telephone Company (Cincinnati) petitioned the Commission for a waiver of Section 69.106 of the Commission's rules. Cincinnati states that a waiver is necessary to establish new rate elements within Local Switching to recover the costs associated with the provision of 500 Access Service. Cincinnati states that the new nonrecurring rate elements will ensure that the specific costs of the 500 Access Service will be charged to the users of the service. Cincinnati requests that the Commission act expeditiously on its waiver request.

On August 24, 1994, the NYNEX Telephone Companies (NYNEX) also filed a petition with the Commission seeking a waiver of the Commission's rules to establish new rate elements for a new switched access service that it proposes to offer. NYNEX states that the new access service -- Advanced Access Screening Capabilities (AASC) -- will initially support translations of NXX codes within the 500 Service Access Code (SAC). At this time, NYNEX seeks to establish a new recurring rate element, the Carrier Identification Charge, although it notes that additional nonrecurring and recurring rate elements may be necessary to provide additional AASC features. NYNEX states that a waiver will allow it to recover its translation costs from the cost causative customer. In addition, NYNEX requests that the Commission act expeditiously on its waiver in order to allow NYNEX to meet the needs of customers already seeking activation of NXX codes within the 500 SAC.

Interested parties should file comments on these petitions by **September 12, 1994**, and reply comments by **September 21, 1994**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc. 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petitions can be obtained from ITS at (202) 857-3800.

We will treat these proceedings as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West Communications, Inc. AAD 93-95
Range Telephone Cooperative, Inc.
RT Communications, Inc.
Tri-County Telephone Association, Inc.,
TCT West, and
Union Telephone Company
Expedited Joint Petition for Waiver
of the Definition of "Study Area"
contained in Part 36, Appendix-Glossary
of the Commission's Rules

and
Range Telephone Cooperative, Inc.
RT Communications, Inc.
Tri-County Telephone Association, Inc.,
TCT West, and
Union Telephone Company
Joint Petition for Waiver of
Sections 61.41(c) and 69.3(e)(11)
of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: August 26, 1994; Released: August 31, 1994

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On July 28, 1993, US West Communications, Inc. ("US West"), RT Communications, Inc. ("RTCI"), Range Telephone Cooperative, Inc. ("Range"), TCT West ("TCT"), Tri-County Telephone Association, Inc. ("Tri-County"); and Union Telephone Company ("Union") (collectively, "Petitioners") filed a joint petition for waiver of the definition of "Study Area" as set forth in the Appendix-Glossary of Part 36 of the Commission's rules.[1] The requested waiver would allow US West to consummate three separate proposed sales of a total of 27 Wyoming exchanges. US West proposes to sell 15 exchanges to RTCI, a newly-established wholly-owned subsidiary of Range; 5 exchanges to TCT, a newly-established wholly-owned subsidiary of Tri-County; and 7 exchanges to Union. Range, RTCI, Tri-County, TCT, and Union (collectively, "the Independents") seek a waiver of the price cap rules contained in Section 61.41(c) of the Commission's rules.[2] Finally, if needed, the Independents seek a waiver of Section 69.3(e)(11) of the Commission's rules.[3]

2. We placed this petition on public notice on August 10, 1993.[4] We received comments from four parties and reply comments from four parties.[5] One of the commenters, Mr. Morris, submitted late comments. We hereby grant his motion to accept his late-filed comments. Bureau staff also requested and received additional information from the Petitioners regarding the proposed transactions.[6] On March 28, 1994, US West submitted a copy of a Wyoming Public Service Commission ("WPSC") Order approving the transfer of 26 of the 27 exchanges.[7] In that Order, the WPSC required that one of the 27 exchanges, the Afton exchange, be sold to Silver Star Telephone Company rather than to Union.[8] As a result, US West withdrew the request to transfer the Afton exchange to Union.[9] Accordingly, the transfer of the Afton exchange is excluded from consideration in this Order.

II. STUDY AREA WAIVER

3. A study area is a geographical segment of a carrier's telephone operations. Generally, a study area represents a carrier's entire service territory within a state. Thus, carriers that operate in more than one state typically have one study area for each state, and carriers that operate in a single state have a single study area. Carriers perform

[1] US West Communications, Inc., Range Telephone Cooperative, Inc., RT Communications, Inc., Tri-County Telephone Association, Inc., TCT West, and Union Telephone Company Joint Petition for Waiver of Sections 61.41(c), 69.3(e)(11) and the Definition of "Study Area" in the Appendix-Glossary of Part 36, of the Commission's rules, AAD 93-95 (filed July 28, 1993) ("Joint Petition").

[2] Section 61.41(c) of the Commission's rules (the "all-or-nothing" rule) provides that when a non-price cap company acquires a price cap company or any part thereof, the acquiring company shall become subject to price cap regulation.

[3] Section 69.3(e)(11) states that "any changes in the National Exchange Carrier Association common line tariff participation and Long Term and Transitional Support resulting from the merger or acquisition of telephone properties are to be made effective on the next annual access tariff filing effective date following consummation of the merger or acquisition transaction...."

[4] Public Notice, 8 FCC Rcd 8797 (Com. Car. Bur. 1993).

[5] Comments were filed by the American Telephone and Telegraph Company ("AT&T"), the MCI Communications Corporation ("MCI"), the National Exchange Carrier Association, Inc. ("NECA"), and Mr. Robert R. Morris. The National Telephone Cooperative Association ("NTCA"), the United States Telephone Association ("USTA"), US West, and the Independents filed reply comments.

[6] US West filed additional information on October 1, 1993 ("October 1 Supplemental Filing"), on May 26, 1994 ("Union Supplement"), and on June 15, 1994 ("US West Supplement"). We also received additional information from Range (filed July 20, 1994) ("Range Supplement"), and Tri-County (filed July 20, 1994) ("Tri-County Supplement").

[7] Wyoming Public Service Commission Order Docket Nos. 70000-TA-93-150, 70000-TA-93-151, 70000-TA-93-152, 70006-TA-93-12, 70011-TA-93-8, 70001-TA-93-7, 70008-TA-93-10, and 70000-TA-93-139 (1994) ("WPSC Order").

[8] *Id.* at 15.

[9] Letter from M. Crumling, US West, to K. Moran, Chief, Accounting and Audits Division, dated March 28, 1994.

jurisdictional separations at the study area level. For jurisdictional separations purposes, the Commission froze study area boundaries effective November 15, 1984.[10] Carriers wishing to change their study area boundaries can file a petition for waiver of the applicable rule.[11] The Commission has three primary concerns in evaluating such petitions: first, that the change not affect adversely the Universal Service Fund ("USF") support program;[12] second, that the state commission(s) having regulatory authority do not object to the change;[13] and finally, that the public interest supports grant of the waiver.[14]

Petition and Pleadings

4. The 26 exchanges that US West proposes to sell to the Independents serve approximately 22,000 access lines, or 10% of US West's lines in Wyoming. US West seeks a waiver to remove the 26 exchanges from its Wyoming study area. Range, Tri-County, and Union are local exchange carriers ("LECs") currently providing service within Wyoming. Range and Tri-County seek waivers to establish two new study areas for the purchased exchanges. Union seeks a waiver to combine the purchased exchanges into its existing study area.

5. RTCI would acquire 15 exchanges serving approximately 14,000 access lines; TCT would acquire five exchanges serving approximately 5,000 access lines; and Union would acquire six exchanges serving approximately 3,000 access lines. Range estimates that grant of the study area waiver would make its new subsidiary, RTCI, eligible for approximately $1.5 million in annual USF support. Tri-County estimates that grant of the waiver would make its new subsidiary, TCT, eligible for approximately $183,000 in annual USF support. Union estimates that grant of the waiver would increase its annual USF support by $311,000, from $304,000 to $615,000. US West estimates that the transfer of the 26 exchanges to the Independents would result in an $837,000 reduction in its annual USF support.[15] US West also states that it will make a voluntary permanent downward adjustment to its price cap indices to reflect the sale of these exchanges.[16]

6. Petitioners contend that the proposed transactions will enable the Independents to achieve operational and cost efficiencies that will benefit both existing and future subscribers.[17] The Independents assert that they plan to upgrade the switching and transmission facilities in the 26 exchanges more rapidly than US West had planned.[18] The Independents also assert that the acquisition of the 26 exchanges will substantially increase their customer bases and, through economies of scale and scope, allow them to provide improved telecommunications services.[19] Petitioners argue that the increase in USF support that would result from the proposed waivers is not adverse to the public interest because the USF is intended to assist smaller companies in providing universal service, including the deployment of new technology to ensure nationwide advances in telecommunications.[20]

7. MCI supports the petitions for waiver, provided that: (1) the purchasers agree not to use the DEM weighting factors[21] specified in the Commission's jurisdictional separations rules;[22] and (2) US West retires the assets from its rate base and transfers them to the purchasers at their net salvage value.[23] MCI also proposes that the carriers provide a specified set of data that will help the Commission determine the appropriate regulatory effects and accounting entries.[24] The Independents reply that MCI's proposal that the purchasers forego DEM weighting in exchange for a waiver of price cap rules would violate the spirit and letter of the Commission's rules.[25]

8. NECA supports Petitioners' requests, and urges the Bureau to grant the waivers expeditiously.[26] AT&T supports Petitioners' request for waiver of the all-or-nothing rule, but expresses concern regarding the increasing number and magnitude of LEC requests for study area waivers. AT&T contends that waiver requests have been spurred by the aggressive efforts of price cap LECs to divest themselves of high cost rural exchanges.[27] It was this concern, AT&T explains, that led it to file a petition to establish additional standards for evaluating study area waiver requests.[28]

9. Robert R. Morris states that the Petitioners have not shown that the proposed waivers are in the public interest. Moreover, Mr. Morris maintains that grant of the study area waiver should not lead to an increase in total USF support payments to the carriers.[29] Mr. Morris argues that the waiver should only be granted if the acquisition price for the 26 exchanges is no greater than US West's net book

---

[10] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (December 12, 1984) (*1984 Joint Board Recommended Decision*), adopted by the Commission, 50 Fed. Reg. 939 (January 8, 1985) (*1985 Order Adopting Recommendation*).

[11] 47 C.F.R. Part 36, Appendix-Glossary.

[12] *See Joint Board Recommendation*, 49 Fed. Reg. at 48337, para. 65.

[13] *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974 (1990). (*"Study Area Notice"*). In that notice the Commission described the factors that led to the present restriction on study area changes.

[14] *Memorandum Opinion and Order*, 9 FCC Rcd 3197 (Com. Car. Bur. 1994).

[15] U.S. West Supplement.

[16] Letter from Laura D. Ford, US West, to Richard Metzger, Acting Chief, Common Carrier Bureau, FCC, dated June 23, 1994 ("Letter from US West").

[17] Joint Petition at 6.

[18] WPSC Order at 11.

[19] *Id.*

[20] *Id.* at 8.

[21] DEM (*i.e.*, relative dial equipment minutes of use) weighting is an allocation methodology that serves as a federal subsidy to aid small carriers. Large carriers (*i.e.*, those with more than 50,000 access lines) allocate costs to the interstate jurisdiction based on their interstate DEM. Small carriers are allowed to multiply their interstate DEM by specified factors, thus allowing the recovery of greater percentages of their costs from the interstate jurisdiction. *See* 47 C.F.R. § 36.125.

[22] *See* 47 C.F.R. §36.125.

[23] MCI comments at 3.

[24] *Id.* at 4.

[25] Independents reply comments at 6-7.

[26] NECA comments at 5.

[27] AT&T comments at 2.

[28] *See* AT&T Petition for Rulemaking, filed September 3, 1993, AAD 93-100.

[29] R. Morris Late-Filed Comments at 6.

value for those exchanges.[30] In its reply comments, NTCA states that Mr. Morris cites no authority for the relief he has requested.[31]

Discussion

10. Petitioners' proposals demonstrate that current and potential customers in the affected exchanges will be better served by the acquiring carriers than by US West. The acquiring carriers plan to replace the existing central office switches and associated equipment with digital technology more rapidly than US West had planned.[32] The Independents state that this is likely to result in improved service and to allow them to extend service to remote areas not currently served.[33] In addition, the WPSC has expressed its unequivocal support of the transactions.

11. Based upon Petitioners' estimates, grant of the study area waivers would increase the USF support of the Independents by approximately $2.3 million in the first year.[34] Offset against this increase in USF are: (1) a reduction of $837,000 in US West's annual draw from the USF,[35] and (2) a substantial, but as yet unspecified, voluntary reduction in US West's price cap indices due to the cost reductions associated with the sale of these high-cost exchanges.[36]

12. We are concerned about the possibility that these sales and a number of similar proposed transactions could, in the aggregate, have a substantial effect on the size of the USF. This concern has been mitigated, however, by the Commission's adoption of the Joint Board's recommendation for an indexed cap on the USF for the next two years. The Joint Board recommended, and the Commission adopted, interim rules that will limit the rate of growth of the USF to the rate of growth in the total number of working loops nationwide.[37] That rate has generally ranged from two percent to four percent per year. This moderate growth rate will allow the USF to continue to provide adequate support to carriers serving high-cost areas, while preventing excessive increases in the USF. In its *Interim Order*, the Commission also expressed its intention to review the USF rules to determine whether permanent changes are necessary.[38] The Commission began this process on August 2, 1994, when it adopted a Notice of Inquiry to examine the Commission's high cost assistance programs.[39] Pending completion of proceedings to review and revise these rules, however, the interim rules adopted by the Commission will remain in effect. The interim rules should, in the short run, limit any adverse effects on the USF that the proposed study area waiver might cause.

13. We have reviewed the objections of MCI and Mr. Morris carefully, and we have determined that they do not warrant denial of the waiver petition. MCI's proposal that we require these assets to be transferred at their net salvage value[40] is inconsistent with Sections 32.2000(b) and 32.2000(d)(5) of the Commission's rules which require telecommunications plant sold together with the associated traffic to be transferred at its net book cost (*i.e.*, the original cost less the applicable accumulated depreciation). MCI's proposal thus would require at least a rule waiver, and possibly a rule change, and presents broader issues that are well beyond the scope of this proceeding. We also decline to adopt MCI's DEM weighting proposal. The Commission has indicated that it will examine the DEM weighting rules in the Notice of Inquiry[41] and it would not be appropriate to grant MCI's proposal in this waiver proceeding. Finally, the additional carrier data which MCI believes is necessary to allow the adequate assessment of the proposed study area waiver was, in fact, filed by the carriers on October 1, 1993.[42]

14. Mr. Morris argued that grant of the waivers would be acceptable if the acquisition prices for the 26 exchanges did not exceed their net book values. His objection appears to be premised upon the assumption that the profit that US West may earn on the transactions would impose unwarranted additional costs upon subscribers in the acquired exchanges. His concern is unfounded. Under the Commission's rules, the amounts that the Independents pay in excess of US West's net book costs generally would not be charged to the Independents' above-the-line accounts.[43] Because those amounts are charged to the Independents' shareholders, not to their ratepayers, we see no adverse effect on the public interest.

15. Another aspect of Petitioners' study area requests warrants discussion. Range and Tri-County propose to establish new study areas for the exchanges that each carrier would purchase, rather than consolidating the purchased exchanges within their existing study areas. This segmentation is at odds with the Commission's frozen study area policy, which was established, in part, to prevent carriers from subdividing study areas to gain an advantage under the USF and jurisdictional separations rules.[44] Range and Tri-County argue that they should be allowed to set up new study areas in Wyoming because: (1) establishing new study areas would lead to reduced USF draws; (2) the existing operations are cooperatives while the newly-acquired operations are for-profit, involving different tax and lender obligations which necessitate use of separate books of accounts; (3) establishing new study areas would prevent

---

30 *Id.*

31 NTCA reply comments at 2.

32 WPSC Order at 11.

33 *Id.*

34 Joint Petition, Attachment B at 1-3, Range Supplement, Tri-County Supplement, and Union Supplement. The Independents estimate that RTCI would be eligible for $1,519,799 in annual USF support, that TCT would be eligible for $183,175 in annual USF support, and that Union's annual USF support would increase from $303,890 to $919,093.

35 US West Supplement.

36 Letter from US West.

37 Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, 9 FCC Rcd 334 (1993) ("Recommended Decision"), *adopted* by the Commission, 9 FCC Rcd 303 (1993) ("Interim Order").

38 Interim Order at 303.

39 *See* FCC News Release, Report No. DC-2632, released August, 2, 1994.

40 MCI comments at 3. MCI argues that these assets are so dated that they have little value. As a result, it suggests that the transfer should be made at the net salvage value.

41 *See* FCC News Release, Report No. DC-2632, released August 2, 1994.

42 October 1 Supplemental Filing.

43 Under 47 C.F.R. § 32.2005 (1993), the Independents may not charge these costs to regulatory accounts without Commission permission.

44 *See 1984 Joint Board Recommended Decision* at para. 65; *1985 Order Adopting Recommendation* at para. 1.

customers of the existing operations from bearing the cost of upgrading outdated facilities in the newly acquired exchanges; and (4) combining the new exchanges with the old would lead to an increased administrative burden. We disagree on all four counts.

16. Range and Tri-County are incorrect in their assertion that their USF amounts would be reduced if new study areas were established. In fact, the establishment of new study areas would maximize their annual USF amounts.[45] We therefore find that allowing Range and Tri-County to create separate study areas rather than adding the acquired exchanges to those carriers' existing study areas would increase their USF assistance unnecessarily.

17. We reject the argument that separate study areas are necessary because separate books of account must be used for the cooperative and for-profit operations of Range and Tri-County. We do not object to their plans to create new, wholly-owned subsidiaries for the acquired exchanges, nor do we oppose their plans to maintain separate books of account. Those plans, however, are not inconsistent with a requirement that the acquired exchanges be added to the existing study areas for purposes of jurisdictional separations.

18. We likewise do not concur with Range and Tri-County's contention that combining study areas for jurisdictional separations purposes would inappropriately burden existing customers with the costs of upgrading outdated equipment in the acquired exchanges. This need not be the case, particularly, inasmuch as WPSC has prohibited the carriers from applying for basic service rate increases for two years and from intrastate carrier charge rate increases for five years.[46]

19. Finally, we disagree that maintaining one study area would result in an overall increased administrative burden. If Range organizes as two carriers in Wyoming, its increased administrative burden would be *de minimis* because it would merely have to combine the cost figures of the two carriers in making its NECA submissions. Inexpensive, widely available "spreadsheet" software should provide all that is necessary for this function. Moreover, any potential increased burden on Range and Tri-County is more than offset by the increased regulatory costs that would result from increases in the number of study areas. We thus deny the request of Range and Tri-County for authority to establish new, separate study areas in Wyoming.

20. We conclude, based upon the record before us as a whole, that Petitioners have made the necessary showings that grant of the requested waiver petition would improve customer service and thus promote the public interest. The WPSC supports the waiver, and the recently adopted interim USF rules will prevent significant adverse effect upon the USF. We therefore grant the study area waiver petition to permit US West to remove the 26 exchanges from its Wyoming study area and to permit Range, Tri-County, and Union to add the acquired exchanges to their existing study areas.

III. PRICE CAPS WAIVER

Petition

21. The joint petition requests waiver of the all-or-nothing price cap rule . Range, RTCI, Tri-County, TCT, and Union seek waiver of this rule to allow their continued participation in NECA pools following acquisition of the 26 exchanges from US West.

22. The all-or-nothing rule provides that when a non-price cap company acquires a price cap company or any part thereof, the acquiring company shall become subject to price cap regulation.[47] Under this rule, the acquisition of the US West exchanges by the Independents obligates them to exit the NECA pools and become subject to price cap regulation. The Independents request waiver of this rule because the rule's application here would be contrary to the public interest and to the purpose of price cap regulation. They argue that they are participating in the NECA pools as small companies, and that continued participation in the pools is essential to their economic viability and to the maintenance of telephone service for their customers. They also request waiver of the concomitant effects of Section 69.3.[48] They state that there is no relationship among the parties to the proposed sale that would allow any of these companies to shift costs as a consequence of the sale.

Discussion

23. The Commission's rules governing mergers and acquisitions provide that when a rate of return company and a price cap company merge, or when one company acquires the other, the resulting company must comply with price cap regulation within a year of the transaction.[49] The rationale for this rule is stated in the *LEC Price Cap Reconsideration Order*. First, in the absence of the rule, a company might attempt to shift costs from its price cap affiliate to its rate of return affiliate, allowing the rate of return affiliate to earn more (because of its greater revenue requirement) without affecting the earnings of the price cap affiliate (*i.e.*, without triggering the sharing mechanism). Second, if a LEC were allowed to go back and forth between rate of return regulation and price cap regulation, it could "game the system" by, for example, building up a large rate base under rate of return regulation, then opting for price caps again and cutting its costs to an efficient level.[50] The Commission stated, however, that "in some

---

[45] Analyses in the Range and Tri-County Supplements, purport to demonstrate that establishing new study areas for the newly-acquired exchanges would reduce their USF amounts by $32,000 annually. These analyses are flawed, however, because the cost data provided for the individual and combined cases are inconsistent. When the data are corrected, it is clear that establishing new study areas would, in fact, lead to an $11,000 increase in their USF amounts.

[46] WPSC Order at 16.

[47] 47 C.F.R. § 61.41(c)(2).

[48] Section 69.3(e)(11) states that "any changes in Association common line tariff participation and ng Term and Transitional Support resulting from the merger or acquisition of telephone properties are to be made effective on the next annual access tariff filing effective date following consummation of the merger or acquisition transaction...."

[49] Second Report and Order, 5 FCC Rcd 6786, 6821 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.*, 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*), *petitions for further recon. pending, appeal docketed sub nom. D.C. PSC v. FCC*, No. 91-1279 (D.C. Cir. June 14, 1991).

[50] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd 2637, 2706.

cases, the efficiencies created by the purchase and sale of [a few] exchanges may outweigh the threat of 'gaming the system.' Such cases might justify narrow waiver of the all-or-nothing rule."[51]

24. In this instance, there is good cause to grant the Independents a waiver of the all-or-nothing rule. The first concern cited by the Commission, cost-shifting among affiliates, is not applicable in this case, because the Independents are not seeking to maintain separate affiliates under different systems of regulation. The second concern underlying the rule, allowing a company to "game" the system, could be a source of concern because US West's sale of these high-cost exchanges will alter the network costs that comprise the basis for US West's current price caps.[52] US West has stated, however, that it will reduce its interstate revenue requirements to reflect the sale of the 26 exchanges to the Independents, and then adjust its price cap indices accordingly.[53]

25. For the reasons discussed above, we therefore grant a waiver of the all-or-nothing rule for the Independents. For the present, the Independents will continue to be regulated under rate of return. Because we are waiving Section 61.41, the Independents need not withdraw from the NECA pools, and Section 69.3 is not triggered, so no waiver is necessary. As with any other rate of return carrier, the Independents are free to elect price cap regulation in the future, provided that they withdraw from the NECA pools.

IV. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 155(c), and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, that the Joint Petition of US West Communications, Inc. and Range Telephone Cooperative, Inc. RT Communications, Inc., Tri-County Telephone Association, Inc., TCT West, and Union Telephone Company for waiver of Part 36, Appendix-Glossary, of the Commission's Rules, 47 C.F.R. Part 36 Appendix-Glossary, IS GRANTED to the extent set forth above.

27. IT IS FURTHER ORDERED that the Petition of Range Telephone Cooperative, Inc., RT Communications, Inc., Tri-County Telephone Association Inc., and TCT West for waiver of Part 36, Appendix-Glossary, of the Commission's Rules, 47 C.F.R. Part 36, Appendix-Glossary, IS DENIED as to the establishment of separate study areas containing the acquired exchanges.

28. IT IS FURTHER ORDERED that the Petition of Range Telephone Cooperative, Inc., RT Communications, Inc., Tri-County Telephone Association Inc., TCT West, and Union Telephone Company for waiver of Section 61.41(c) of the Commission's Rules, 47 C.F.R. § 61.41(c), IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Deputy Chief
Common Carrier Bureau

---

[51] *Id.* at note 207.

[52] The generic issue that is posed more generally by this set of circumstances is being considered by the Commission in CC Docket No. 94-1. The Commission may require automatic adjustments to price capped rates to reflect the revenues that are being removed from price cap regulation after reviewing the record in that docket.

[53] Letter from US West.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-98

In the Matter of

Amendment of Section 73.202(b), RM-8433
Table of Allotments,
FM Broadcast Stations.
(Addison, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 18, 1994; Released: September 9, 1994

Comment Date: November 3, 1994
Reply Comment Date: November 18, 1994

By the Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Dorsey Eugene Newman ("petitioner") requesting the allotment of FM Channel 289A to Addison, Alabama, as that community's first local aural transmission service. Petitioner stated his intention to apply for Channel 289A if allotted to Addison, as requested.

Technical Statement

2. A staff engineering review of the proposal reveals that Channel 289A can be allotted to Addison consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is located at least 12.9 kilometers (8.0 miles) northeast of the community at coordinates 34-16-00 and 87-04-00. The site restriction is required to avoid a short-spacing to the licensed site of Station WKXM-FM, Channel 290A, Winfield, Alabama, at coordinates 34-01-53 and 87-48-06.[1]

3. We believe the public interest would be served by proposing the allotment of Channel 289A to Addison, Alabama, since an interest has been expressed in providing that community with its first local aural transmission service. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, to include Addison, Alabama, as follows:

City	Channel No. Present	Proposed
Addison, Alabama		289A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 3, 1994**, and reply comments on or before **November 18, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner and his consultant, as follows:

Dorsey Eugene Newman
2213 Burning Tree Drive
Decatur, AL 35603

and

Kirk A. Tollett
Commsouth Media Associates
4001 Highway 78 East
Jasper, AL 35501
(Consultant)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Although the restricted site for Channel 289A at Addison creates a short spacing to the allotment reference coordinates for Channel 291C3 at Hartselle, Alabama, at coordinates 34-27-09 and 86-42-27, it does comply with the minimum distance separation requirements at the transmitter site authorized in the license issued to Station WTAK-FM, Channel 291C3, Hartselle, at coordinates 34-27-45 and 86-38-36.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1).303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed RuleMaking* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment onthem in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered ascomments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Complaint of Fouce Amusement Enterprises, Inc. against Cablevision Industries/West Valley Cablevision Industries, Inc.	CSR-4012-M CA0833

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: August 26, 1994; Released: September 9, 1994

By the Chief, Cable Services Bureau:

1. On August 10, 1993, a petition on behalf of Fouce Amusement Enterprises, Inc., licensee of Television Broadcast Station KRCA (Ind., Ch. 62), Riverside, California, was filed with the Commission against Cablevision Industries dba West Valley Cablevision Industries, Inc. ("CVI"), operator of a cable television system serving Los Angeles, California. KRCA claims that CVI declined to carry the station, even though it is a "local" signal within the meaning of §4 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), because KRCA is a commercial broadcast station in the Los Angeles, California Area of Dominant Influence (ADI), where CVI's system is located. An opposition to this complaint was filed September 15, 1993, on behalf of CVI, to which KRCA replied.

2. In support of its petition, KRCA states that it first notified CVI that it was seeking to enforce its must-carry rights on March 31, 1993, but in response was informed by CVI of potential signal quality and copyright liability issues. KRCA avers, however, that its attempts to resolve these issues with CVI have been less than successful. It states that its initial request to discuss the signal quality issue was rebuffed until after the copyright issue was resolved. Only after it agreed to reimburse CVI's copyright royalty fees for carriage of KRCA, based on estimates provided by the system on June 18, 1993,[1] did the system's chief technician agree to discuss signal quality. Because both parties agreed that KRCA's off-air reception would not meet the minimum signal quality standards, KRCA maintains that it discussed delivery of its signal via either fiber optic or microwave links with CVI and was advised at that time that space was available on the system's tower for a microwave receive dish. Nevertheless, although it immediately began making arrangements to deliver an adequate signal to CVI's headend and agreed to compensate the system for any copyright liability, KRCA argues that the system has still not acknowledged that it would carry KRCA.

3. CVI's opposition argues that KRCA's allegation of noncompliance with the must-carry rules was premature because at the time it was made[2] KRCA was not delivering a good quality signal. CVI argues further that since it has never refused to carry the station, KRCA's complaint to the Commission should also be dismissed as premature. Should it be considered, however, CVI maintains that KRCA failed to provide it with details regarding the method it intended to follow in delivering a good quality signal to the system's headend. CVI therefore requests, in view of the above, that the Commission find that it does not have any obligation to carry KRCA on its Los Angeles system because the station does not deliver a good quality signal.

4. In its reply, KRCA points to its discussion with CVI's system engineer as proof that CVI was well aware of the signal quality issues prior to KRCA's notice of noncompliance to CVI and the filing of its complaint with the Commission. Indeed, it argues that it would have discussed the issue even earlier had CVI not delayed such discussion because of copyright liability issues. Further, KRCA objects to CVI's contention that its agreement to be responsible for the delivery of an adequate signal to the system headend is inadequate.[3] KRCA maintains that this is totally at odds with the Commission's *Clarification Order in MM Docket No. 92-295*, 8 FCC Rcd 4142, 4144 (1993), which states that a cable operator's refusal to permit a broadcaster to provide the necessary equipment for delivery of its signal "clearly interferes with a broadcaster's statutorily mandated must-carry rights and the Commission will take whatever remedial action deemed appropriate in such cases."

5. We do not accept CVI's argument that the must carry complaint KRCA filed with the Commission was premature. In the *Report and Order in MM Docket No. 92-259*, 8 FCC Rcd 2965 (1993), we stated at paragraph 103 that "Should the parties be unable to resolve their dispute informally based upon the above, a station denied carriage because the cable operator claims the station fails to deliver a good quality signal may file a complaint with the Commission." From the information presented, it appears that KRCA made several attempts to resolve the signal quality issue with CVI to the extent that carriage would result. When it was unable to do so, it was well within its rights to file the present complaint with the Commission.

6. Section 614(h)(1)(B)(iii) of the 1992 Cable Act provides "that a cable operator is not required to carry a local commercial television station that does not deliver [a good quality signal] to the principal headend of a cable system *if the station does not agree to bear the costs of delivering a good quality signal* (emphasis supplied)." We do not agree with CVI's contention that KRCA has failed to resolve its signal availability problem. In the *Report and Order, supra*, at paragraph 101 we stated that "If the problem stems from an unsatisfactory quality local television signal received at the cable system's principal headend, the cable operator is not required to bear the burden of improving the signal, however, we expect it to cooperate with the television

[1] Previous to this date, CVI apparently provided a different estimate of its expected copyright royalty costs.
[2] KRCA's letter of July 13, 1993, to CVI.
[3] KRCA states in its reply that after evaluating its options, it has chosen to deliver its signal via microwave link and it applied for and received a microwave license from the Commission.

station to resolve the problem." While there appears to have been some initial reluctance on CVI's part to even discuss the signal quality issue, once KRCA was able to contact CVI's system engineer and discuss the most appropriate means of delivering its signal, it took the proper steps to effectuate this in applying for a microwave license with the Commission. CVI argues that KRCA was being uncooperative in providing such details as proposed equipment needs and timetables for installation. We would point out, however, that in the *Clarification, supra,* at paragraph 15, we state "we note that a broadcast station's ability to deliver a good quality signal may depend on factors that it cannot control (*e.g.*, when a supplier can provide the needed equipment). Therefore, a time limit on the exercise of must-carry rights is not only contrary to the 1992 Act and our rules, but is unrealistic." In this instance, KRCA had to first receive a microwave license to deliver its signal before it could make arrangements to deliver its signal properly. Finally, there is no indication that KRCA has asked CVI to bear any of the costs associated with the delivery of its signal. We therefore find that, upon delivery of a good quality signal, KRCA meets the requirements of a local commercial television station entitled to carriage. We note also that CVI has made no challenge in its opposition that refutes the copyright liability agreement set forth by KRCA.

7. Accordingly, the complaint filed August 10, 1993, by Fouce Amusement Enterprises, Inc. IS GRANTED, pursuant to §614(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Cablevision Industries dba West Valley Cablevision Industries, Inc. IS ORDERED to commence carriage of Station KRCA forty-five (45) days after KRCA establishes that it is capable of providing a good quality signal to CVI's principal headend. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones, Chief
Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 2, 1994

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON ROCHESTER TELEPHONE CORPORATION'S PETITION FOR WAIVER OF THE COMMISSION'S RULES FOR 500 ACCESS SERVICE

On August 30, 1994, Rochester Telephone Corporation (Rochester) filed comments on various petitions for waiver of the Commission's rules to establish new rate elements governing the provision of 500 access service. In its comments, Rochester states that it supports a proposal by US West that the Commission issue a blanket Part 69 waiver to permit exchange carriers to develop specific rate elements governing 500 access service.

In its filing, Rochester also seeks a waiver of the Commission's rules, in the event that the Commission declines to adopt a blanket waiver. Rochester states that without a waiver it is unable to respond to customer needs by providing 500 access service.

Interested parties should file comments on this petition by **September 16, 1994**, and reply comments by **September 26, 1994**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc. 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petitions can be obtained from ITS at (202) 857-3800.

We will treat these proceedings as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 2, 1994

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON BELL ATLANTIC'S PMSI ONA SERVICE

CC DOCKET NO. 88-2, Phase I

On April 18, 1994, Bell Atlantic Network Services, Inc. (Bell Atlantic) sent a letter to the Chief of the Common Carrier Bureau describing an upgrade service it plans to offer. On August 5, 1994, Bell Atlantic sent a letter to the Acting Secretary of the Federal Communications Commission describing further the proposed service. Bell Atlantic proposes to add a new Basic Service Element (BSE) described as Premier Messaging Services Interface (PMSI). Bell Atlantic states that PMSI is an upgrade of an existing service, Messaging Service Interface. PMSI uses the Signalling System 7 Network to pass calling and called number information between central offices. Bell Atlantic requests that we treat these letters as an amendment to its ONA Plan, if the Commission consider's PMSI to be a new service.

In its letters, Bell Atlantic states that it believes that expanding an existing enhanced service offering does not require an amendment to its Open Network Architecture (ONA) Plan. Bell Atlantic argues that such a requirement will delay the introduction of new technology and the availability of upgraded features to enhanced service providers.

Interested parties may file comments on Bell Atlantic's PMSI Service by **September 15, 1994**, and reply comments by **September 22, 1994**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, FCC, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the letters can be obtained from ITS, Inc. at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-306

In re Applications of

Henry R. Malloy, Jr. d/b/a REM MALLOY BROADCASTING	File No. BPH-860627MH
PEEBLES BROADCASTING COMPANY	File No. BPH-860603ME
James S. Lee and Donald L Baker d/b/a INTERACTIVE MEDIA	File No. BPH-860707MS
FREE AIR CORPORATION	File No. BPH-860707NH
BERNARD DAWSON	File No. BPH-860707NW
SPECIAL MARKETS MEDIA, INC.	File No. BPH-860703MH

For Construction Permit for a
New FM Station on Channel 275A,
Raleigh, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: August 30, 1994; Released: September 12, 1994

By the Review Board: MARINO (Chairman) and GREENE.[1]

1. The Review Board has before it requests to add financial and related misrepresentation issues against two of the applicants remaining in this proceeding, Rem Malloy Broadcasting and Free Air Corporation.

BACKGROUND

2. After three hearings, Administrative Law Judge Joseph Chachkin concluded that three of the applicants in this proceeding are not qualified: Peebles Broadcasting Company (PBC) because of finances; Interactive Media because it lacks reasonable assurance of a site; and Special Markets Media, Inc. because of misrepresentations involving a daytime AM station it owns in the same market and lack of candor in this proceeding. Over the strong procedural objection of some parties because Bernard Dawson had certified he was not financially qualified in his application and never amended the application, the ALJ resolved a financial issue favorably to Dawson and concluded that he was the preferred applicant pursuant to the later discredited comparative integration criterion in *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1963). *See Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993) (integration preference is unlawful). The ALJ's decisions are reported as *Initial Decision*, 4 FCC Rcd 8423 (1989); *Supplemental Initial Decision*, 6 FCC Rcd 2247 (1991); and *Further Supplemental Initial Decision*, 7 FCC Rcd 8024 (1992). Exceptions to these decisions are pending.

3. Subsequent to the parties' exceptions and in response to *Bechtel*, the Commission announced its intention to stay pending cases where integration has been a crucial factor while it considers appropriate action responsive to the court's opinion. *FCC Freezes Comparative Proceedings*, 9 FCC Rcd 1055 (1994).[2] The Board is directed to continue issuing decisions "only in cases in which consideration of the applicants' comparative qualifications is unnecessary to resolve the case." *Id.; Modification of FCC Comparative Proceedings Freeze Policy*, Public Notice FCC 94-204 at 2, August 4, 1994. If unresolved comparative issues remain, proceedings should not be bifurcated to adjudicate basic qualifications issues. *Id.* at 2. In this case, issues concerning the basic qualifications of four of the applicants have been tried and argued in exceptions, and substantial and material questions of fact were raised about the basic qualifications of the other two before the freeze. Because resolution of these issues may make resolution of the proceeding possible without any comparative consideration, the Board sees no need to further delay a further hearing.

REM MALLOY BROADCASTING

4. An applicant's financial qualifications, a long-standing requirement of the Communications Act of 1934, as amended, *see* 47 U.S.C. § 308(b), are established if the applicant has "reasonable assurance of having sufficient funds to construct the proposed station and operate it without revenue for three months." *Northampton Media Associates*, 4 FCC Rcd 5517, 5518 (1989), *aff'd*, 941 F.2d 1214 (D.C. Cir. 1991), citing *Revision of Form 301*, 50 RR 2d 381, 382 ¶ 6 (1981), and *FCC Form 301*, 50 RR 2d at 388 (Section III Instructions ¶ C). Malloy appears to have been qualified when he filed his application for the new

[1] Board Member Greene has replaced the late Board Member Eric T. Esbensen on the panel in this proceeding. Board Member Norman B. Blumenthal, who also served on this panel, passed away May 11, 1994.

[2] The Commission released a *Second Further Notice of Proposed Rulemaking* in GC Docket No. 92-52, *Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 9 FCC Rcd 2821 (1994). This follows on the *Notice of Proposed Rulemaking* and the *Further Notice of Proposed Rulemaking* in *Reexamination*, 7 FCC Rcd 2664 (1992) and 8 FCC Rcd 5475 (1993), respectively.

Raleigh station. The question here is whether Malloy lost his financial qualifications during the course of this proceeding, a question not addressed on the record below.

5. By *Memorandum Opinion and Order*, 8 FCC Rcd 7923 (1993), the Review Board directed Rem Malloy to supplement the record because his cost estimates increased substantially when he amended to a new site, and he had not prepared or given the bank from whom he sought supplemental financing any balance sheets regarding his own financial situation. This raised a question as to whether the bank had sufficient information to give Malloy "reasonable assurance that the loan would be available," the Commission's standard for establishing an applicant's financial qualifications when relying on bank financing. *Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117, 1120 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 959 (1979). If the bank lacked sufficient information for informed decision-making, there would be a substantial and material question as to whether the bank's letter evidenced the "present firm intention to make a loan; future conditions permitting." *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 167 (1980), which is the essence of the reasonable assurance standard. *See, e.g., Liberty Productions, a Limited Partnership*, 7 FCC Rcd 7581, 7584 ¶ 23 (1992), *recon. dismissed*, 8 FCC Rcd 4264 (1993); *Scioto Broadcasters, Limited Partnership*, 5 FCC Rcd 5158, 5160 ¶ 12 (Rev. Bd. 1990), *rev. denied*, 6 FCC Rcd 1893 (1991), *aff'd mem. sub nom. Mid-Ohio Radio, Ltd. v. FCC*, 990 F.2d 1377 (D.C. Cir. 1993).

6. Malloy complied with the Board's *Order* by filing a Supplemental Submission Regarding Financial Qualifications on December 3, 1993. There he claimed that the accompanying documents "establish beyond any doubt that Malloy was financially qualified when he filed his application in 1986, remained financially qualified in 1988 when he changed sites and modified his financial plan, and remains demonstrably qualified today." Malloy Supplemental Submission at 4. To support this claim, Malloy submitted a 1986 loan letter and financial statement from his father, H. Rembert Malloy, M.D., who was Malloy's sole source of financing when Malloy certified to his financial qualifications in 1986. Dr. Malloy's 1986 letter stated, "I am willing to loan you or your company the sum of $250,000.00 to be used for construction and operation [of a new FM station]." *Id.*, Exh. A to Declaration of Henry R. Malloy, Jr. (hereinafter Malloy Declaration). The loan was to be evidenced by a promissory note signed by Malloy; no other security was to be required. *Id.* Dr. Malloy's 1986 net worth was shown to be in excess of $600,000 from stocks, an investment fund, and real estate, including his home. According to Malloy, Dr. Malloy's net liquid assets at that time were "in excess of $215,000." *Id.*, Malloy Declaration at 1. Malloy's estimated construction and operating costs totalled $175,526 for his 1986 proposal. *Id.*, Malloy Declaration, Exh. C at 5.

7. Malloy's estimated costs under his revised 1988 budget totalled $364,024. *Id.*, Malloy Declaration, Exh. F at 5. To meet these costs, Malloy showed two sources of funding: his father and NCNB National Bank in Raleigh.[3] Malloy explained in his Declaration at 2:

> Because the cost of implementing my revised proposed construction and operating budget would exceed my father's net liquid assets, I decided to seek out a reasonable assurance of bank financing which could supplement or serve as a substitute for my father's willingness to loan me money depending on the circumstances which might actually be presented if I were awarded the permit.

Malloy's father executed a revised letter stating his willingness to loan Malloy $150,000 under the same terms and conditions as stated in his earlier letter. *Id.*, Malloy Declaration, Exh. G; *id.*, Declaration of Henry R. Malloy, M.D. (Dr. Malloy Declaration), Exh. C. Dr. Malloy explained that he had been giving his son assistance in paying the attorneys and engineers for the application but that the revised cost estimate exceeded his net liquid assets. *Id.*, Dr. Malloy Declaration. Dr. Malloy's net worth had decreased to $473,000 since 1986. *See id.*, Malloy Declaration, Exh. H; *id.* Dr. Malloy Declaration, Exh. D.

8. Malloy's other funding source was NCNB National Bank whose Vice President Mary Webb executed a letter stating the bank's willingness to lend Malloy $375,000. *id.*, Malloy Declaration, Exh. I; *id.*, Affidavit of Mary Webb Baggett, Exh. 1, which would cover all the estimated costs for the station. The loan would be secured by a deed of trust on station real estate, a security interest in equipment, and the personal guarantees of Malloy and Dr. Malloy. This letter included the interest rate and amortization schedule for the loan. While the letter was not intended to be a legally binding commitment on the bank's part, it stated at page 2:

> [I]t is designed to assure the FCC that we have listened to your plans for the construction of the station and are of the opinion that should you be issued the permit, we would be willing to loan the funds to you to construct and operate the radio station for a period of three months. We were involved in 1987 in the sale of an AM-FM combination in the Raleigh-Durham market for $6.5 million.

Ms. Webb provided an affidavit in which she gave the background of her letter. *Id.*, Affidavit of Mary Webb Baggett. She explained that she met with Malloy and his counsel for an hour and a half during which time they discussed Malloy's employment history and broadcasting background, the station's estimated monthly billings, and the adequacy of such billings to service the station's operating expenses and debt. *Id.* at 1-2. They also discussed Mr. Malloy's personal net worth and Dr. Malloy's willingness to help his son with a loan and his guarantee for a bank loan. Ms. Webb "reviewed Dr. Malloy's current financial statement. Dr. Malloy's net worth was approximately $470,000 which would provide significant support for his guarantee." *Id.* at 2. Ms. Webb said she judged Malloy's business proposal to be sound. *Id.* at 3. Before issuing the letter she received the concurrence of her direct superior, Senior Vice President Madelyn Eve Clow, and she spoke with one of the bank's in-house attorneys regarding the specific language to be included in the letter. *Id.* at 4. Ms.

[3] NCNB changed its name to NationsBank of North Carolina, N.A., on January 1, 1992. Malloy Supplemental Submission, Affidavit of Madelyn Eve Clow.

Clow confirmed that, in issuing the letter, "Ms. Webb was acting within her authority and consistent with the bank's practices. She discussed the issuance of the letter with me and I approved of its issuance." *Id.*, Affidavit of Madelyn Eve Clow. Dr. Malloy affirmed his willingness to guarantee the loan for his son. *Id.*, Dr. Malloy Declaration at 2. NationsBank's willingness to make a loan of $375,000 subject to the conditions enumerated in the 1988 NCNB letter was reaffirmed in a December 1, 1993 letter to Malloy from Susan M. McDonough, Vice President, Commercial Banking Manager of NationsBank in Raleigh attached to Malloy Supplemental Submission.

9. PBC, Free Air, Dawson, and Special Markets jointly responded to Malloy's showing and dispute Malloy's financial qualifications.[4] Accepting for the sake of argument that Dr. Malloy's net liquid assets were sufficient to cover Malloy's estimated construction and operating costs in 1986 even if they were insufficient to cover the total promised loan, the Joint Respondents argue that the decline in Dr. Malloy's net worth between 1986 and Malloy's acquisition of bank financing in 1988 show that at some unreported point Malloy lost his financial qualifications. "Most importantly, [Dr. Malloy's] liquid assets in the form of stocks declined from $231,000 to $72,259, and his current liabilities increased from $18,000 to $24,261. Thus, as of August 17, 1986, [Malloy's] father had net liquid assets of only $47,998 to cover Malloy's then current $175,526 estimate of the costs of construction and operation." Joint Response to Malloy's Supplemental Submission Regarding Financial Qualifications at 4-5. Because the information about Malloy's financial condition comes from Malloy's own evidence, the Joint Respondents argue that the Board can dismiss Malloy's application without further hearings for failing to be financially qualified "for a significant part of the period between June of 1986 and August of 1988," *id.* at 5, and for failing to report these allegedly changed financial circumstances. *Id.* at 7. They also argue that Malloy misrepresented his reason for seeking the bank financing. They assume he needed bank financing at least in part because of the decline in Dr. Malloy's assets, although Malloy had explained that he sought bank financing solely because of the change in his engineering proposal. *Id.* at 5, 7. If Malloy's application is not immediately dismissed, the Joint Petitioners request financial, reporting and character issues against Malloy.

10. The Joint Respondents also question the reasonableness of the assurance contained in the 1988 bank letter Malloy received from NCNB National Bank. They argue that nothing in Malloy's submissions shows that the bank was aware of: (1) the deterioration in Dr. Malloy's financial condition preceding the 1988 balance sheet it saw; or (2) Dr. Malloy's pledge to loan his son $150,000 of the assets shown in his 1988 balance sheet and relied on by the bank. They also argue that the bank did not attempt to verify the values of Dr. Malloy's assets and had no information on Malloy's own financial position. According to the Joint Respondents, this demonstrates that the bank has not undertaken the kind of in-depth inquiry necessary to provide reasonable assurance to Malloy. *Id.* at 8-10. The Joint Respondents see this letter as a mere accommodation to the attorney representing Malloy at the time.

11. Finally, even if the 1988 bank letter were sufficient under the Commission's reasonable assurance standard, the Joint Respondents question whether the assurance continues to be valid. Although NationsBank, the successor to NCNB, reaffirmed the 1988 letter in its December 1, 1993 letter, the Joint Respondents question whether it was aware of Dr. Malloy's current financial condition, which they allege "continues to deteriorate." *Id.* at 10. As support for the alleged continuing deterioration, the Joint Respondents submitted copies of public records showing that: (1) Sears, Roebuck filed suit against Dr. Malloy in March 1993 for failing to pay his revolving charge accounts debts in 1992 and 1993, *id.* App. IV at 1-3; the suit was dismissed in June 1993; *id.* at 4-5; (2) Dr. Malloy twice borrowed against his residence, which raised the mortgages against the property to $99,000 from the $19,100 listed in his 1988 financial statement; *id.* at 6-13; and (3) Dr. Malloy twice borrowed against a piece of real estate listed as unmortgaged in his 1988 financial statement and then sold the property in April 1993. *Id.* at 14-18. They point out that nothing in the 1993 letter shows receipt of updated financial information from the Malloys and question whether the bank would stand behind its reasonable assurance letter if it knew of these changes in the financial circumstances of Malloy's guarantor. The Joint Respondents argue these matters must also be explored under a financial issue.

12. The Joint Respondents have not sought to raise a *prima facie* question about the sufficiency of Malloy's assurance of financing when he certified to his financial qualifications in 1986 under the short-lived certification procedure in effect at that time, and we do not find a substantial and material question of fact from the information before us. Although the 1986 balance sheet of Dr. Malloy, on whom Malloy initially relied for all of this financing, did not show sufficient net liquid assets to cover the entire amount of the promised loan, it did show sufficient net liquid assets to cover Malloy's estimated costs for constructing and operating the station for three months without revenues. This is all that Malloy is required to have available under the Commission's financial standard and, thus, all that Malloy is required to substantiate. *See Northampton*, 4 FCC Rcd at 5518 ¶ 13.[5]

---

[4] Peebles, Free Air, Dawson and Special Markets will hereinafter be referred to as "Joint Respondents."

[5] In its exceptions, Free Air questions other aspects of Malloy's financial proposal, but we find no basis from the exceptions to pursue these matters in a further hearing. First, Free Air challenges the adequacy of Malloy's equipment quotes to establish his costs because they were two years old and allegedly out-of-date at the time Malloy filed his application. *See Northampton*, 4 FCC Rcd at 5519 ¶ 15 (reasonable assurance requires "serious and reasonable efforts to ascertain predictable construction and operation costs" before certification). But, according to the ALJ, Malloy represented that he and counsel had "reviewed the cost estimates to make sure that they were still currently applicable. No evidence has been submitted to the contrary." Tr. 50. This current review of the equipment proposal distinguishes this case from the reliance on two-year-old financial projections that led to an issue in *Columbus Broadcasting Corp.*, 3 FCC Rcd 5480, 5482 ¶ 13 (Aud. Serv. Div. 1988), upon which Free Air relies. Free Air offers nothing in its exceptions to show how this ruling was in error. Free Air also questions Malloy's initial financial qualifications because Malloy never obtained independent appraisals of his father's non-liquid assets. However, Malloy testified in his deposition that he understood the Commission's financial certification to require liquid assets and that he had determined his father met this test. Malloy dep. tr. 38, App. A to Malloy Opposition to Petition to Enlarge, Dec. 14,

13. In light of Malloy's supplemental information, we also do not find a substantial and material question of fact as to whether Malloy had reasonable assurance of a loan from NCNB in 1988. In her unrebutted sworn statement, NCNB Vice President Mary Webb described a detailed conversation with Malloy before she signed the 1988 bank letter with the concurrence of her supervisor. According to Ms. Webb, she and Malloy discussed, *inter alia*, Malloy's personal net worth and broadcasting background, Dr. Malloy's willingness to help his son with a loan and his guarantee, and Dr. Malloy's 1988 financial statement. Although Malloy did not present his own financial situation in writing, the point emphasized by the Joint Respondents, we are satisfied from Ms. Webb's description of the meeting that the bank had sufficient information about Malloy and his proposal for an informed decision under the circumstances of this case. *Compare Short Broadcasting Co., Inc.*, 8 FCC Rcd 5574, 5575 ¶ 8 (Rev. Bd. 1993) (*Liberty/Scioto* standard met where applicant provided sufficient information about itself and its plans to satisfy lender, even though applicant did not provide and lender did not want personal financial data); *with Global Information Technologies, Inc.*, 8 FCC Rcd 4024, 4028 ¶ 15 (no reasonable assurance where discussions with lender included no information on applicant's personal finances or net worth, and lender had little knowledge of project's value, had no background in broadcast lending, performed no market analysis, and did not know whether the applicant was experienced in broadcasting), *recon. denied*, 8 FCC Rcd 6629 (Rev. Bd. 1993); *and Maria M. Ochoa*, 7 FCC Rcd 6569, 6572-73 (Rev. Bd. 1992) (purported lender lacked sufficient information for reasonable assurance where, *inter alia*, he had not spoken with the applicant or seen financial statements or a business plan for the station) (subsequent history omitted).

14. The Joint Respondents would have us reject the bank's letter in spite of Ms. Webb's statement because Dr. Malloy's assets had diminished between 1986 and 1988 and Dr. Malloy had promised to loan money to his son. But, the bank was satisfied with the assets Dr. Malloy had when it issued the letter and, contrary to the Joint Respondents' assertion, Ms. Webb's sworn statement shows that the bank was aware of Dr. Malloy's willingness to loan money to his son, presumably to reduce the amount needed from the bank. The reasonable assurance standard requires no more. The unredacted letter Malloy submitted states the bank's willingness to loan Malloy sufficient funds to cover the costs of construction and initial operation of the station, describes the security required for the loan, and includes the interest rate and amortization schedule for the loan. When read in conjunction with Ms. Webb's statement and that of her supervisor who concurred in the issuance of the letter, the letter meets the *Liberty/Scioto* standard. Nothing before this Board suggests that the information made available to the bank was insufficient from the bank's point of view. *See Isis Broadcast Group*, 7 FCC Rcd 5125, 5129 ¶ 16 (Rev. Bd. 1992), *rev. denied*, 8 FCC Rcd 7040 (1993). *Compare id.* at 5126-28 (reasonable assurance not found where bank officer testified bank letter was intended as accommodation to relative of applicant, bank had no information about the applicant or its business plan, no collateral was discussed, bank was unsure what role relative might play in the financing, and applicant did not discuss alleged guarantor role with relative until well after certifying to financial qualifications). The Commission does not second-guess a bank's lending judgment. *See Liberty*, 7 FCC Rcd at 7584 ¶ 22; *Annette B. Godwin*, 8 FCC Rcd 4098, 4101 ¶ 10 (Rev. Bd. 1993). Whether the bank should have relied on Dr. Malloy's assets when the bank issued its 1988 letter is primarily a question for the bank and does not warrant an issue here. *See generally, A. P. Walter, Jr.*, 6 FCC Rcd 875, 878 ¶ 16 (Rev. Bd. 1991).

15. Before the bank letter can be accepted as the basis for Malloy's financial qualifications, however, two questions must be answered at a new hearing. The first is whether Malloy lost his reasonable assurance of financing from his father before his changed technical proposal caused him to seek alternative financing from the bank. As the Joint Respondents argue, Dr. Malloy's 1988 financial statement shows far less in net liquid assets than the cost of Malloy's initial proposal, although Dr. Malloy was to be the sole source of funding until Malloy changed his technical proposal in 1988 and got reasonable assurance of financing from NCNB. If Malloy did lose his financing because of changes in Dr. Malloy's net liquid assets, an amended financial proposal would be acceptable only if Malloy could show good cause for the amendment in accordance with the elements set forth in *California Broadcasting Corp.*, 90 FCC 2d 800, 808 (1982), and *Erwin O' Connor Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970), and applied in *Royce International Broadcasting Co. v. FCC*, 820 F.2d 1332, 1335 (D.C. Cir. 1987), *see* 47 CFR 1.65(a), a showing not tendered here. *See Global Information Technologies, Inc.*, 8 FCC Rcd at 4027 ¶ 12; [6] *Edwin A. Bernstein*, 6 FCC Rcd 6841, 6842 ¶ 8 (Rev. Bd. 1991); *Global Information Technologies, Inc.*, 5 FCC Rcd 3385, 3387 ¶ 7 (Rev. Bd. 1990); *see generally CHM Broadcasting Limited Partnership*, No. 92-1263, slip op. at 9 (D.C. Cir. June 14, 1994) (court rejected contention that FCC had not provided adequate notice of requirement that applicant amend to report loss of financing and substitute financing). Thus, further hearing on the continuous availability of financing for the duration of Malloy's original technical proposal is necessary before the Board can accept Malloy's reliance on the NCNB letter. *See Weyburn Broadcasting Limited Partnership v. FCC*, 984 F.2d 1220, 1229 (D.C. Cir. 1993) (case remanded because of substantial and material questions of fact as to whether applicant "was continuously financially qualified").

16. The second question concerns the current status of Malloy's bank letter. Clearly, in both the 1988 NCNB letter and the NationsBank confirmation in 1993, Dr. Malloy's guarantee is a critical condition of Malloy's reasonable assurance of a bank loan. It follows, then, that adverse changes in Dr. Malloy's financial circumstances could adversely affect this reasonable assurance. The Joint Respondents point to the suit brought against Dr. Malloy because

---

1988. Appraisals of fixed assets are required for establishing an applicant's financial qualifications only when an applicant relies on those assets. Free Air offers nothing to contradict Malloy's deposition testimony that he did not. Thus, *Texas Communications Limited Partnership*, 5 FCC Rcd 5876, 5878 (Rev. Bd. 1990) (subsequent history omitted), cited by Free Air is inapposite.

[6] Citing *Texas Communications Limited Partnership*, 6 FCC Rcd 5191, 5192 (1991), *recon. denied*, 7 FCC Rcd 3186 (1992), *aff'd sub nom. CHM Broadcasting Limited Partnership v. FCC*, No. 92-1263 (D.C. Cir. June 14, 1994).

of problems with his Sears credit account, the mortgages placed on his residence and one of his investment properties, and the ultimate sale of the mortgaged investment property as reason to believe that Dr. Malloy's net worth has decreased since Malloy got the bank letter on the basis of his father's guarantee and assets. They posit that NationsBank would not continue to stand behind the 1988 letter if it knew of these changes. We recognize that an individual's asset holdings will change over time, and that changes would not undermine a financial proposal where the value remains sufficient to support the financial qualifications. In this case, however, we agree with the Joint Respondents that the repeated mortgaging of property and the sale of a piece of property, which collectively appear to reduce Dr. Malloy's net assets below the amount of the loan he is to guarantee, as well as the lawsuit over a revolving charge account, raise a question about the current sufficiency of Dr. Malloy's assets to meet the conditions in the bank letter on which Malloy is now relying for his financing. This is a question of potential decisional significance affecting Malloy's current financial qualifications and must also be explored at hearing. *Compare F.E.M. Ray, Inc.*, 7 FCC Rcd 848 (1992) (no issue warranted because of alleged financial problems of lender and two stockholders where monies expected from them either had been paid or were not the primary basis for the applicant's financial qualifications).

17. We do not agree with Joint Respondents that a reporting violations issue is warranted at this time for Malloy's alleged failure to report the loss of his financing. There are substantial and material questions of fact about Malloy's continued financial qualifications because of changes in Dr. Malloy's financial statement and his property dispositions, which will be explored in the further hearing, but there has been no *prima facie* showing of an intent to conceal decisionally significant information or a pattern of repeated violations or other circumstances reflecting significant carelessness or inattentiveness to Malloy's obligation to report decisionally significant information that would warrant a disqualifying reporting issue. *Merrimack Valley Broadcasting, Inc.*, 99 FCC 2d 680, 683 n.9 (1984), *modifying criteria in Merrimack*, 55 RR 2d 23, 25 ¶ 3 (1983); see *Weyburn Broadcasting Limited Partnership*, 5 FCC Rcd 861, 862-63 ¶ 9 (Rev. Bd. 1990) (§ 1.65 issue designated in light of question as to whether applicant deliberately concealed changed financial circumstances) (subsequent history omitted); *see also David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1260, 1261 (D.C. Cir. 1991) (applicant's two filings stating or implying applicant's reliance on a transmitter site known to be unavailable presented potential evidence of intent to conceal such that disqualification under § 1.65 was possible). The same is true with respect to Free Air's argument in its exceptions that the ALJ erred in failing to designate a reporting issue against Malloy because he did not amend his application with a new financial certification when he supplemented his original financing with bank financing. Free Air 1991 Brief at 17.[7] If Dr. Malloy indeed became unable to meet his commitments to his son, what Malloy knew about his father's circumstances and when he knew it will have a bearing on whether any disqualifying reporting issue is warranted. The ALJ has authority to add any issues warranted by the evidence adduced during the remand hearing.

18. In opposing Free Air's request for a reporting issue, Malloy argued that he had no reporting obligation under 47 CFR 1.65 because:

> [H]e never in fact "lost" his financing and was never financially unqualified. An applicant is given a grace period of thirty days in which to amend and, *during that period* Malloy promptly moved to buttress his finances in light of an unanticipated, involuntary site move. No amendment "re-certifying" Malloy's qualifications was necessary.

1991 Consolidated Reply Exceptions of Henry R. Malloy, Jr. at 4 (emphasis in original). This view is in error.

19. Section 1.65(a) requires that applicants report significant changes in the information in their applications and substantial changes in any other matter having decisional significance within thirty days of the change. The thirty-day grace period to which Malloy alludes is a period for coming to the Commission without having to make a good cause showing, not an exoneration from the requirement that the Commission be advised of substantial and material changes to the applicant's qualifications. The change in Malloy's financial circumstances -- new costs requiring additional financing from an additional or replacement source -- clearly affects Malloy's financial qualifications and, so, should have been reported, at least with an updated certification stating he remained financially qualified, if that was true. *Cf. Lafourche Valley Enterprises, Inc.*, 22 RR 2d 228, 234 ¶ 8 (Rev. Bd. 1971) (a change in circumstances such that total resources available for construction and initial operation are less than the stated costs is "highly pertinent" to an applicant's financial qualifications). In its *Order* in *Colorado Television, Inc.*, FCC 84R-16 (Rev. Bd. released Mar. 1, 1984), which Free Air has cited, the Board pointed to "the well-established necessity of accompanying a transmitter site change amendment with an updated financial proposal demonstrating sufficient funds to meet construction and operation costs associated with the new site." There a certification statement was sufficient for the applicant who had initially certified to its financial qualifications and against whom no financial issue had been specified. *See Wilson County Broadcast Services, Inc.*, FCC 83R-102 (Rev. Bd. released Dec. 27, 1983) (applicant whose finances had been approved in hearing designation order and against whom there were no designated financial issues would be allowed to certify to sufficient assets for increased costs). Malloy's reliance on *WEZY, Inc.*, 3 RR 2d 606 (Rev. Bd. 1964), as support for his argument that nothing was required from him is misplaced. The *WEZY* applicant was not required to amend his application as a precondition for introducing evidence at hearing because its evidence merely reinforced its earlier financial showing. With his need for new bank financing in the face of increased costs -- and to cover the decrease in the amount of the initial financing available to him, Malloy

[7] Although Malloy did not recertify his financial qualifications when his costs changed or advise the Commission of the bank loan through an amendment, he did disclose the loan during discovery.

has modified his financial proposal. In contrast, in *F.E.M. Ray*, 7 FCC Rcd 848, *denying review of* 6 FCC Rcd 4238 (Rev. Bd. 1991), the applicant was not required to report replacement of a loan commitment where the replaced commitment was not essential to the applicant's financial qualifications. There the applicant had recertified in its affidavit opposing a motion to add a financial issue.

20. All of the Joint Respondents except Dawson argue that Malloy's failure to attempt to amend his application to establish reasonable assurance of the NCNB loan after changing his antenna site is an additional ground for dismissal without a hearing. Joint Response at 6-7. We disagree. In *Texas Communications*, 6 FCC Rcd at 5192 ¶ 7, the Commission distinguished between a failure to amend that is "merely a harmless procedural omission" and circumstances where an applicant lost financing and lacked diligence in dealing with and advising the Commission about its problem. In the instant case, Malloy claims to have been continuously financially qualified since his initial certification. Until questions about the validity of that claim are resolved on the record, we are unable to determine whether Malloy's failure to file a financial amendment reflecting additional financing for his new site is anything more than "a harmless procedural omission." We note that no one has alleged any dilatoriness in seeking supplemental financing on Malloy's part.[8]

21. Finally, we will not add a character issue because of the lack of a *prima facie* showing that Malloy intended to deceive the Commission about his financing. *See, e.g., Armando Garcia*, 3 FCC Rcd 1065, 1067 ¶ 15 (Rev. Bd.), *rev. denied*, 3 FCC Rcd 4767 (1988); *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983). But, here again, the ALJ may revisit this point and add an appropriate issue if the evidence developed on remand raises a substantial and material question about whether Malloy misrepresented his reason for seeking bank financing or lacked candor in failing to disclose relevant information about his father's ability to provide either the financing or the guarantee upon which Malloy has relied for his financial qualifications.

FREE AIR CORPORATION

22. In Free Air's case, the question is whether the applicant was continuously financially qualified during this proceeding. Free Air, a corporation owned equally by Sara J. Estrada and Olga V. Castellanos,[9] is the subject of a Motion to Reopen the Record and Enlarge the Issues filed by Dawson on January 11, 1994 (hereinafter Dawson Motion). Dawson alleges that Free Air has failed to report a $2.6 million lien against assets owned jointly by Sara Estrada and her husband and that Free Air is not financially qualified. The basis for this contention is the 1991 guilty pleas entered by Estrada's husband to two counts of conspiracy to defraud the United States[10] and two counts of filing false tax returns, for which he was sentenced to a term of incarceration totaling forty-eight months, fined $20,000,[11] and ordered to make restitution to the United States in the amount of $2.6 million, jointly and severally with his co-defendants. To ensure restitution, on January 24, 1992 the Department of Justice filed a lien against the property of Mr. Estrada, which Dawson interprets to include the home jointly owned by Mr. and Mrs. Estrada. *See* Dawson Motion, Attach. 2.

23. Although Mr. Estrada is not a party to Free Air's application and Mrs. Estrada has not been accused of any wrongdoing, Dawson argues from circumstantial evidence that Mrs. Estrada and Free Air benefitted from Mr. Estrada's criminal activity: (1) She has been dependent on Mr. Estrada for support. (2) The tax returns that Mr. Estrada admitted were false were those filed for 1986 when Free Air's application was filed and 1988 when the application was set for hearing.[12] (3) Mr. Estrada served as an advisor to his wife in her prosecution of Free Air's application.[13] To Dawson these points strongly suggest that the fruits of a conspiracy to defraud the United States Government were used to prosecute Free Air's application. Dawson further complains that the applicants were improperly denied any information about Free Air's financial qualifications when Free Air withdrew its integration proposal and refused to comply with discovery orders. Only those applicants proposing integration were required to exchange financial documents. *See Memorandum Opinion and Order*, FCC 88M-4398 (ALJ released Dec. 27, 1988) (Motion to Compel Production of Documents against Free Air denied).[14] Finally, Dawson questions whether, under these

---

[8] The Joint Respondents do argue, however, that Malloy did not meet with the bank to request a loan until the day after he filed his engineering amendment on Aug. 17, 1988. Joint Response at 8.

[9] *Initial Decision* at 8426 ¶ 34; Dawson Motion to Reopen the Record and Enlarge the Issues, Attach. 1 at 3, Free Air FCC Form 301, p. 3.

[10] According to the criminal information to which Mr. Estrada pleaded guilty, he was a vice president of an American corporation which was involved in providing machinery for fertilizer plants in Pakistan. He admitted to participating in two conspiracies to unlawfully secure payments from the Agency for International Development for kickbacks and commissions substantially in excess of the fair market value of the goods and services AID had agreed to fund. These activities went on from 1986 to 1990. *See* Dawson Motion, Attach. 4.

[11] The fine was calculated as an unspecified percentage of Mr. Estrada's net worth. *Id.*, Attach. 5 at 17, sentencing tr. 17.

[12] During Mr. Estrada's October 28, 1991 sentencing hearing, the Assistant United States Attorney representing the Government commented for the record "that for the tax years 1986 through '89, Mr. Estrada under-reported his income by $53,000 the first year, 88 the second; $365,000 the third, and 46,000. This resulted in $166,215 in federal income tax not being paid for those four years." *Id.*, Attach. 5 at 10, sentencing tr. 10.

[13] According to Mrs. Estrada:

> Jose [Mr. Estrada] has been aware of the need of Hispanic Americans to get involved in politics in the U.S. He has expressed the political views of Hispanics, and their needs and concerns. My husband has been supportive on an FM radio project that a friend of mine, Olga Castellanos, and myself were trying to carry out to help the Hispanic community. Jose provided ideas on how to attract the Spanish radio listeners and on how to implement community services to the Raleigh area through our proposed radio station.

Id., Attach. 7 at 3, Letter from Sara J. Estrada to The Honorable James C. Fox, Sept. 30, 1991, at 3.

[14] Free Air's application was designated for hearing before the Commission amended its procedural rules to include a standard document production order for comparative broadcast proceed-

circumstances. Mrs. Estrada might herself have significant tax liabilities (if she filed jointly with her husband); whether her home is encumbered by the lien against Mr. Estrada; whether she has any assets to contribute to the prosecution of Free Air's application; and whether any lender would make a loan to Free Air.

24. Free Air vehemently objects to Dawson's motion, characterizing it as speculative and utterly without substantive merit. With respect to Dawson's allegation about benefit to Free Air from Mr. Estrada's wrongdoing, Free Air responds that, according to the documents Dawson submitted, the court found that funds Mr. Estrada received from the fraud "were segregated in a bank account which was under the control of a third person and then returned to the U.S. Government during the investigation by the U.S. Attorney." Free Air Opposition to Motion to Reopen the Record at 2 (hereinafter Free Air Opposition). According to Free Air, the court records provide no indication that any AID funds were used to pay Free Air's expenses or to benefit it in any way. *Id.* With respect to Dawson's speculation that Mrs. Estrada may have tax liabilities from her husband's false tax returns, Free Air asserts that court records "show absolutely no involvement by Sara Estrada in any tax evasion in concert with her husband, or suggest that she has any tax liabilities whatsoever. The public records show no tax liens against her." *Id.* at 3. With respect to the lien on Mr. Estrada's property, Free Air argues: "Nothing on the face of the lien indicates that it was imposed on the property of Sara Estrada, or on her interest in any property co-owned with Jose Estrada, such as a personal residence." *Id.* at 4. Mrs. Estrada obtained a mortgage on her personal residence after the lien had been entered, *id.*, Attach. 1, which Free Air argues shows that the lien is not against the residence and that Mr. Estrada's problems have no impact on Mrs. Estrada's ability to borrow money or on her financial qualifications. With respect to the alleged violation of the Commission's reporting requirement in 47 CFR 1.65, Free Air argues that Mr. Estrada's employer at the time of the fraud has agreed to assume responsibility for restitution of the full amount and has executed a deed of trust on its property to guarantee this, which "in effect, indemnified Jose Estrada and the other defendants for making restitution for the AID funds . . . ." *Id.* at 4 and Attach. 2. According to Free Air, "in view of the fact that the lien has no actual impact on Jose Estrada's financial qualifications" and, therefore, no impact on Mrs. Estrada's or Free Air's qualifications, there was no reporting violation. *Id.* at 5. With respect to Dawson's complaint about the ALJ's discovery ruling, Free Air argues that the parties waived objection by failing to take timely exception to the ruling, the ALJ has wide discretion as to the conduct of hearings, including discovery, and Dawson has made no showing of abuse of the ALJ's discretion. Free Air also argues that Dawson's motion is grossly untimely and that Dawson has failed to meet his burden of raising a question of probable decisional significance and demonstrating the likelihood of proving the allegations, which is required for late-filed motions to enlarge.[15]

25. Dawson disputes Free Air's statement about the court finding that funds Mr. Estrada improperly received had been segregated. According to the transcript of Mr. Estrada's sentencing, his *lawyer* advised the court that money had been kept available to return to the government and was returned, Dawson Motion, Attach 5 at 8, sentencing tr. 8, but the lawyer also advised the court that Mr. Estrada had used some of the money for the benefit of his family. *Id.* at 9 lines 15-22. From this, Dawson speculates that fraudulently obtained funds were commingled with the joint funds from which Mrs. Estrada paid her share of Free Air's expenses. Dawson also argues that Free Air has failed to present any factual rebuttal to Dawson's showing. For example, Free Air has provided no information at all concerning the basis for its financial certification and should at least be required to supplement the record with the documents and understandings it relied on for its financial certification rather than be allowed to hide behind procedural rules. Dawson also faults Free Air for failing to provide any declaration that Mrs. Estrada did not incur civil tax liabilities as a result of her husband's criminal tax evasion and for failing to provide citations for its assertion that the Estrada's house was not affected by the lien on Mr. Estrada's property.

26. Section 1.229(c) of the Commission's Rules, 47 CFR 1.229(c), provides that a motion filed outside the time specified for filing motions to enlarge and not showing good cause for the untimeliness

> will be considered on its merits if (and only if) initial examination of the motion demonstrates that it raises a question of probable decisional significance and such substantial public importance as to warrant consideration in spite of the untimely filing.

The Commission has emphasized the need for diligence in raising new matter and the high hurdle that must be met when a movant is lacking in diligence so that the goals of expediting the hearing process and instituting new service are not undermined. *See Liberty*, 7 FCC Rcd at 7582-83 ¶ ¶ 11, 14; *Great Lakes Broadcasting, Inc.*, 6 FCC Rcd 4331, 4333 ¶ 15 (1991) (admonishing Board and ALJs to "strictly enforce the provisions of Section 1.229, including the requirement that petitions to enlarge issues rely on evidence that is new and that could not reasonably have been discovered earlier, in order to expedite the hearing process and the institution of new service."); *Adjudicatory Re-regulation Proposals*, 58 FCC 2d 865, 874 ¶ 23 (1976) (timeliness requirement will be strictly construed).

---

ings. Now, under amended 47 CFR 1.325(c) (1992), financial documents must either be produced or objected to on the basis of privilege.

[15] Free Air also seeks an apology from and sanctions against Dawson's counsel pursuant to 47 CFR 1.52 for "reckless" and "scandalous" allegations. Free Air Opposition at 2, 3; *see id.* at 4. Dawson objects, arguing that his motion did not accuse Mrs. Estrada of unlawful activity, but did question whether the money available to her might have been from the proceeds of the fraud and whether she might have any civil tax liability if she had jointly filed the false tax returns. We find no basis for sanctions from the pleadings before us. We remind all attorneys, however, that an attorney's signature to a pleading "constitutes a certificate by him that he has read the document; that to the best of his knowledge, information, and belief there is good ground to support it; and that it has not been interposed for delay." 47 CFR 1.52. Participation in Commission proceedings with less than the highest level of professionalism disserves the client, the parties, the Commission, and the public.

27. Dawson's motion is clearly untimely. It was filed without any showing of diligence two years after the information about Mr. Estrada became publicly available. *See Liberty, supra* (movant filing more than 2 years after information could have been discovered from public records with no explanation for delay lacked due diligence).[16] Nonetheless, Dawson's motion and the accompanying documents, when read in conjunction with Free Air's opposition, raise doubt about Free Air's basic financial qualifications that goes to the grantability of Free Air's application and cannot be dismissed with procedural arguments alone. *See Astroline Communications Limited Partnership v. FCC*, 857 F.2d 1556, 1561-62 (D.C. Cir. 1988) (discussing standards for specifying a hearing); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394-95 (D.C. Cir. 1985) (same); 47 U.S.C. § 309(e). We are designating an appropriate issue against Free Air and remanding for further hearing on the merits.[17]

28. Free Air certified to its financial qualifications under the Commission's former certification procedure, which did not require any description of the basis for the certification, and no description of its proposal has been disclosed by Free Air. The following information is available, however. Mrs. Estrada, a fifty percent owner of Free Air's voting stock, is Free Air's vice president, secretary and a director.[18] She has not proposed to be integrated in the business; she appears to bring no broadcasting or other expertise to the venture; and she is not the applicant's signatory. The inference from this is that her contribution to the venture will be responsibility for the proposed station's financial qualifications commensurate at least with her ownership interest.[19] According to information provided the court at the time of Mr. Estrada's 1991 sentencing, she has been dependent on her husband for economic and other support. She "has never been employed outside the home and she needs [Mr. Estrada's] support, both emotional and economic." Dawson Motion, Attach 6 at 2, Letter from Santiago M. Estrada to The Honorable James C. Fox, Chief Judge, United States District Court, Eastern District of North Carolina, Sept. 24, 1991, at 2.[20] She had been taking college classes and hoped to earn a degree in December 1991 after eight years of college. *Id.*, Attach. 7 at 4, Letter from Sara J. Estrada to The Honorable James C. Fox at 4. "My husband has given me all his support and love and it is because of him that I am actually looking at my graduation getting closer." *Id.* Free Air's curiously worded Opposition to Dawson's Motion also lends credence to the assumption that Mr. Estrada is backing Mrs. Estrada's interest in the instant application. Explaining that Mr. Estrada's employer at the time of the fraud had assumed responsibility for making restitution of all the funds owed AID, Free Air said: "Accordingly, the DOJ lien has no actual impact or bearing on Jose Estrada's financial qualifications. Therefore, it would have no impact or bearing on Sara Estrada's financial qualifications, and thus would have no impact or bearing on Free Air's financial qualifications." Free Air Opposition at 4. We assume that, if Mr. Estrada were not essential to supporting Mrs. Estrada's financial interest in the applicant, Free Air would have chosen a different way to express its view that the lien against Mr. Estrada is irrelevant.

29. Whether Mr. Estrada can provide backing in light of his problems is open to question. He was described to the court as working hard to care for his family, supporting his parents since they arrived in the United States as refugees from Cuba and putting pressure on himself to send his children "to the best private schools, to get the best possible education." *Id.*, Attach. 6 at 1-2, Letter from Santiago M. Estrada at 1-2; *id.*, Attach. 5 at 12, sentencing tr. 12. According to counts three and four of the Criminal Information against him, he reported total income of $76,810 for calendar year 1986 and $52,310 for calendar year 1988, presumably omitting his proceeds from the fraud. *Id.*, Attach. 4 at 11, 12, Criminal Information at 11, 12. His lawyer at sentencing advised the court that Mr. Estrada has made restitution for his share of the proceeds of the fraud, some of which he may have spent for his family. *Id.*, Attach. 5 at 7-8, 9, sentencing tr. 7-8, 9. "The money that he has used even through the Venezuelan situation or the situation with regard to this case, has gone for . . . I guess it's gone for tuitions and things like that. . . . He doesn't own a lot of homes, or more than one. He hasn't taken extravagant vacations. It's been for the benefit of his family . . . ." *Id.*, sentencing tr. 9. Mr. Estrada may still be incarcerated under the sentence imposed in 1991. He and his wife mortgaged their home in November 1992. Free Air Opposition, Attach. 1, Deed of Trust.

---

[16] Unlike *Great Lakes*, however, Dawson had no personal knowledge of adverse information about Free Air's financial qualifications, discovery about Free Air's financial proposal was not available, and the information underlying Dawson's motion did not become a matter of public record until after the initial hearing had been concluded. But, we note the coincidence of the filing of the motion with the court's decision in *Bechtel*, 10 F.3d 875, which elevated Free Air's chances in this proceeding by holding unlawful the comparative integration factor under which Dawson had hoped to be successful. *See generally Cleveland Television Corp. v. FCC*, 732 F.2d 962, 973 n.23 (D.C. Cir. 1984) (using previously available information to gain an opportunity to present additional evidence is disfavored); *See Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941) (parrying with an offer of more evidence only after receiving an adverse decision is disfavored; "No judging process . . . could operate efficiently or accurately if such a procedure were allowed.").

[17] We recognize that it is within our discretion to first seek additional information from Free Air as we did with Malloy in the hope that further hearing could be avoided. *See Order*, 8 FCC Rcd 7923 (Rev. Bd. 1993). However, now that further hearing on Malloy's financial qualifications is necessary, we hope to expedite the ultimate resolution of this proceeding, if possible, with a single -- and last -- remand order. If appropriate, summary decision procedures are available pursuant to 47 CFR 1.251. *But see Weyburn Broadcasting*, 984 F.2d 1220 (hearing required when use of summary decision procedure left unanswered questions).

[18] Dawson Motion, Attach. 1 at 3, Free Air application, FCC Form 301, Section II, question 5.(a). The application does not show any nonvoting stock.

[19] *Cf. Oliver Kelley and Mary Ann Kelley*, 6 FCC Rcd 7377, 7378 ¶ 8 (Rev. Bd. 1991) (integration proposal credited where one principal to application paid the bills and the other played a key role in preparing and prosecuting the application and had broadcast and management experience), *rev. denied*, 7 FCC Rcd 4239 (1992).

[20] Santiago Estrada, the Estradas' son, wrote regarding the sentencing of his father. At the time of this correspondence, Mrs. Estrada was recovering from a serious illness; thus her need for emotional support. *See* Dawson Motion, Attach. 7 at 4, Letter from Santiago M. Estrada at 2; Letter from Sara J. Estrada to The Honorable James C. Fox at 4.

30. We agree with Free Air that there is a degree of speculation here, for, although the Communications Act requires that the Commission assure itself of an applicant's financial qualifications before making a grant, the application form requirements in effect when Free Air applied for the Raleigh channel required no information to support a claim of financial qualifications. *See* FCC Form 301, Section III (Apr. 1985); *Northampton*, 4 FCC Rcd at 5518-19 ¶ ¶ 11-14 (applicant need not submit extensive information or even have it on hand at filing). Nonetheless, we must heed the court's admonition in *Citizens for Jazz on WRVR*, 775 F.2d at 397, that we look for fire when enveloped in smoke. We also must heed the court's admonition in *Citizens for Jazz* and *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501, 509-10 (D.C. Cir. 1988), that we not hold a movant to an unreasonable burden when a legitimate question has been raised, particularly when the expositive facts are within the exclusive control of the party under scrutiny. *See generally California Public Broadcasting Forum v. FCC*, 752 F.2d 670, 679-80 (D.C. Cir. 1985). If Free Air was depending at least in part on Mrs. Estrada when it certified to its financial qualifications, which Free Air's opposition and Mrs. Estrada's ownership position suggest and Free Air does not deny; if Mrs. Estrada was depending on backing from her husband, which Free Air's opposition and information about her economic dependency suggest and Free Air does not deny; and if Mr. Estrada's resources are as modest as suggested to the sentencing court and he has been incarcerated rather than employed for several years during the pendency of this proceeding, then there is a serious question as to whether Mrs. Estrada has continuously had available the resources needed for her commitment to Free Air in light of her husband's reverses. Therefore, there is a substantial and material question as to whether Free Air has been continuously financially qualified.[21] *See generally Weyburn Broadcasting*, 984 F.2d at 1229 (hearing required where questions remained as to whether applicant was continuously financially qualified). This we cannot overlook simply because Free Air has eluded prehearing discovery and responded here with a general demurrer.[22] In light of Free Air's control of the information about its financial proposal, it will be assigned both the burden of proceeding and the burden of proof on the designated financial issue.

31. Dawson has also requested an issue under 47 CFR 1.65 because Free Air did not advise the Commission about the Department of Justice lien against Mr. Estrada's property or of financial problems experienced by the Estradas. There is no information before us of any deceitful intent in withholding any potentially decisional information from the Commission. Without deceitful intent, any violation of section 1.65 that might have occurred would not be disqualifying. However, the ALJ has discretion to add issues warranted by information developed during the remand.

32. ACCORDINGLY, IT IS ORDERED That this proceeding IS REMANDED to the Presiding Officer for further hearing consistent with this *Memorandum Opinion* and the preparation of a second further supplemental initial decision on the following issues:

(a) To determine whether Rem Malloy Broadcasting has continued to be financially qualified since filing its application to construct and operate an FM broadcast station in Raleigh, North Carolina, and, if not, the effect thereof on its basic qualifications.

(b) To determine whether Free Air Corporation was financially qualified when it filed its application to construct and operate an FM broadcast station in Raleigh, North Carolina, and thereafter, and, if not, the effect thereof on its basic qualifications.

33. IT IS FURTHER ORDERED That Rem Malloy Broadcasting SHALL BEAR the burden of proceeding and the burden of proof on issue (a), and that Free Air Corporation SHALL BEAR the burden of proceeding and the burden of proof on issue (b).

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

[21] That the challenge is to Free Air's basic financial qualifications satisfies the substantial public importance requirement of 47 CFR 1.229(c) and *Great Lakes*. If the scenario described in the text is accurate, there is a substantial likelihood of proving the allegations against Free Air. Thus, the matters alleged here are of probable decisional significance as required by 47 CFR 1.229(c) and *Great Lakes*, 6 FCC Rcd at 4332 ¶ 9, for an untimely motion to enlarge to be granted.

[22] In addition to the argument that Free Air's fifty percent stockholder has suffered serious financial reverses since Free Air filed its application, Dawson's analysis has depended substantially on his view that Free Air may have been financed with money that Mr. Estrada fraudulently obtained from the government and that Free Air, therefore, should not be found financially qualified. We agree with Free Air that the connection between AID funds and Free Air's application is speculative. Furthermore, how to evaluate the financial qualifications of an applicant who may be relying on money that arguably belongs to the government was specifically left unresolved by the Commission in *Las Americas Communications, Inc.*, 6 FCC Rcd 1507, 1513 n.23 (1991) (FCC did not decide whether principal whose taxes were unpaid at time principal was prosecuting FCC application should be disqualified under financial issues or whether principal's unadjudicated tax problems were cognizable as character issue; applicant disqualified on other grounds). At this time there also is no issue about the character of either Mrs. Estrada or Free Air because of Mr. Estrada's misadventures for, as noted earlier, there is no suggestion that Mrs. Estrada was involved in any way in the fraud, and as Free Air has argued in its Opposition at 2, no evidence that she knowingly used fraudulently-obtained funds to prosecute the instant application.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Petition for Reconsideration

TELESCRIPPS CABLE COMPANY

of Certification of
Tazewell County, Virginia (VA0203)
to regulate basic cable service rates

MEMORANDUM OPINION AND ORDER

Adopted: August 31, 1994; Released: September 2, 1994

By the Chief, Cable Services Bureau:

1. On March 3, 1994, TeleScripps Cable Company ("TeleScripps") filed a timely Petition for Reconsideration challenging the certification of Tazewell County, Virginia ("Tazewell") to regulate TeleScripps' rates for basic cable service and associated equipment. TeleScripps claims that it is subject to effective competition and, therefore, is exempt from rate regulation. TeleScripps also filed a supplement to its petition pursuant to *Cable Operators' Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Services Rates*, DA 94-828, released July 29, 1994 (*"Effective Competition Order"*).[1]

2. Section 623(a)(4) of the Communications Act, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition.[3] Such certification becomes effective within 30 days of the filing unless the Commission finds that the authority does not meet the statutory certification requirements.[4] Cable operators may file petitions for reconsideration of the franchising authority's certification.[5] Regulation of rates is automatically stayed pending review of a petition for reconsideration alleging effective competition.[6]

3. Cable operators have the burden of rebutting the presumption that effective competition does not exist.[7] TeleScripps claims that its system serving Tazewell County, Virginia meets the first of the three effective competition tests set forth in the Communications Act and the Commission's Rules. That is, it claims that, "[f]ewer than 30 percent of the households in its franchise area subscribe to the cable service of a cable system."[8] Specifically, TeleScripps claims that it serves a total of 2,453 subscribers in Tazewell County which has a total of 11,892 "housing units" in the Tazewell County, VA rural area. As support it submits copies of subscriber computer print-outs as of January 31, 1994 and the relevant page from the 1990 Census indicating that there are 11,892 "total rural housing units" within Tazewell County. Based on these figures, TeleScripps contends that its penetration level is at 20.62%.

4. We find that TeleScripps has failed to meet its burden of rebutting the presumption that effective competition does not exist in its franchise area. First, and most importantly, TeleScripps uses inappropriate housing data to make its effective competition claim. Specifically, TeleScripps' claim is inappropriately based on the number of housing units (that is, occupied and vacant units) within the franchise area. Our rules, however, require the use of data reflecting the number of "households" (*i.e.*, occupied housing units) in the franchise area. *See Third Order on Reconsideration*, in MM Docket Nos. 92-266 and 92-262, 59 FR 17,961, 17,962 (April 15, 1994).

5. Second, while TeleScripps indicates that it served 2,453 subscribers in Tazewell County, it has compared this figure to household data for only the rural area of Tazewell County. There is no indication in the filings before us that the franchise in question is only for the rural areas of the county. Although we recognize that including data from the rest of the county would show an even smaller subscriber penetration, we have no basis on the record before us for properly matching subscriber and household data. Third, TeleScripps indicates that its subscriber numbers are composed of data from "Franchise Area 06-Fall Mills area," "Franchise Area 07-Tazewell County, general," and "Franchise Area 08-Pocahontas area." This suggests that there are three separate franchise areas in question. If that is correct, a separate effective competition showing must be made for each separate franchise area where certification is challenged since the rules in question are administered on a franchise-area by franchise-area basis. As TeleScripps did not measure its penetration level using the correct data, it has failed to demonstrate that effective competition exists. Accordingly, we deny its petition.

---

[1] The *Effective Competition Order* set forth guidelines for cable operators and franchising authorities actively participating in effective competition challenges to franchising authorities' certifications. It also offered such cable operators and franchising authorities an opportunity to supplement their pending pleadings by August 19, 1994.

[2] *See* 47 C.F.R. § 543(a)(4).

[3] *See* 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] *See* 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: (1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; (2) the franchising authority lacks the legal authority to adopt, and the personnel to administer, rate regulations; (3) procedural laws and regulations applicable to rate regulations proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. *See* 47 C.F.R. § 76.910(b)(4).

[5] *See* 47 C.F.R. §§ 1.106, 76.911; *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993).

[6] 47 C.F.R. § 76.911(c).

[7] 47 C.F.R. §§ 76.906, 76.911(b).

[8] 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by TeleScripps Cable Company IS DENIED.

7. IT IS FURTHER ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

8. IT IS FURTHER ORDERED that TeleScripps Cable Company SHALL FILE the required rate justifications on the appropriate forms with Tazewell County within 30 days from the release date of this *Memorandum Opinion and Order* or 30 days from the date of notice from Tazewell County that it is regulating rates, whichever is later.

9. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, as amended, 47 C.F.R. § 0.321.

10. Interested parties may refer inquiries to Lisa M. Higginbotham, Cable Services Bureau, Consumer Protection Division, at (202) 416-0856.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Petition for Reconsideration

SUMMIT COMMUNICATIONS, INC.

of Certification of
the City of Seattle (WA0414)
to Regulate Basic Cable Rates

MEMORANDUM OPINION AND ORDER

Adopted: September 1, 1994; Released: September 2, 1994

By the Chief, Cable Services Bureau:

INTRODUCTION

1. On October 28, 1993, Summit Communications, Inc. ("Summit") filed a timely petition for reconsideration challenging the certification of the City of Seattle ("Seattle") to regulate the system's rates for basic cable service and associated equipment. Seattle opposed Summit's petition and Summit filed a reply.[1] In addition, both parties filed responses to Commission requests for additional information and clarification.

2. Section 623(a)(4) of the Communications Act of 1934, as amended, allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.[2] For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable systems within their jurisdiction are not subject to effective competition.[3] Such certification becomes effective within 30 days of filing unless the Commission finds that the authority does not meet the statutory certification requirements.[4] Cable systems may file petitions for reconsideration of such certification within 30 days of the effective date of such certification.[5] Rate regulation is automatically stayed pending review of a timely filed petition for reconsideration alleging the presence of effective comeptition.[6]

BACKGROUND

3. Seattle, by ordinance, has divided itself into five separate franchise districts for which it grants separate, nonexclusive franchises to provide cable service.[7] Currently, two districts have been franchised to TCI; one district has been franchised to Viacom; and one district ("Central District") has been franchised to Summit.[8] Seattle's request for certification covers each of the four districts.[9] The fifth district, the "Downtown Business District" has not been franchised to a specific cable operator.[10] However, Seattle has issued permits to TCI and to Summit to establish cable service in specific areas of the "Downtown Business District."[11] Seattle states that the issuance of street permits to Summit in the "Downtown Business District" is separate from and bears no relationship to Summit's "Central District" franchise.[12] Further, it notes that under its city ordinance, such permits may not be construed as a franchise.[13] Seattle states that it did not request certification to regulate rates in the area covered by the "Downtown Business District."[14]

ARGUMENTS OF THE PARTIES

4. Summit claims that its system is subject to effective competition and, therefore, is exempt from rate regulation. It claims that its system meets the first of the three effective competition tests set forth in the Communications Act and the Commission's Rules. Summit states that "[f]ewer than 30 percent of the households in its franchise area subscribe

---

[1] Summit contends that Seattle's opposition is untimely and, therefore, should be dismissed. We disagree. Summit's petition was filed on October 28, 1993. Section 1.4(h) of the Commission's Rules allows an additional three days to respond to a pleading where: service of the pleading is required by statute or regulation, the required service is completed by mail, and the filing period for a response to the pleading is 10 days or less. 47 C.F.R. § 1.4(h). Section 1.106 of the Commission's Rules requires that petitions for reconsideration be served on interested parties and that an opposition to such a petition must be filed within 10 days from the date the petition was filed. 47 C.F.R. § 1.106. Summit served a copy of its petition by mail. Thus, Seattle had an additional three days or until November 10, 1993, to file its opposition. As Seattle's opposition was filed on November 10th, it is timely.

[2] *See* 47 U.S.C. § 543(a)(4).

[3] *See* 47 C.F.R. §§ 76.906, 76.910(b)(4).

[4] *See* 47 C.F.R. § 76.910(e). Certification becomes effective unless the Commission determines that: 1) the franchising authority will not adopt and administer rate regulations that are consistent with the Commission's regulations; 2) the franchising authority lacks the legal authority to adopt, and the personnel to adminster, rate regulations; 3) procedural laws and regulations applicable to rate regulations proceedings by the franchising authority do not provide a reasonable opportunity for consideration of the views of interested parties; or (4) the cable system in question is subject to effective competition. *See* 47 C.F.R. § 76.910(b)(4).

[5] *See* 47 C.F.R. §§ 1.106, 76.911, *Report and Order and Further Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 8 FCC Rcd 5631, 5693 (1993) (*"Rate Order"*).

[6] 47 C.F.R. § 76.911(c).

[7] Seattle's Response Letter dated March 1, 1994, at 1.

[8] *Id.* In its reply, Summit claims that its system "competes directly in Seattle with Viacom, serving approximately 400,000 customers in the Puget Sound area, and TCI serving approximately 30,000 customers in the Puget Sound area." However, Summit does not indicate that TCI or Viacom offer cable services within Summit's franchise area. Moreover, it acknowledges that it does not provide cable service in any of the franchise districts served by Viacom or TCI. Summit Reply, at 2.

[9] Seattle March 1, 1994, Letter, at 1-2; Seattle's Opposition, at 3.

[10] Seattle Opposition, at 3.

[11] Seattle states that the permits generally cover service to an extremely restricted geographic area, such as a city block.

[12] Seattle Response to Commission's Augut 5, 1994, letter, at 3.

[13] *See* Section 21.60.700 of the Seattle Municipal Code.

[14] Seattle's March 1, 1994, Letter, at 2.

to the cable service of a cable system."[15] Calculating its penetration level based on subscriber and housing data for both the "Central District" and the entire "Downtown Business District," Summit claims that its service area (which it considers to be both districts) has 41,114 "potential" customers (both residential and commercial)[16] of which its system serves 10,459. Based on these figures, Summit claims that its penetration level is only 25.4%. Thus, Summit argues that it is subject to effective competition and, therefore, exempt from rate regulation.[17]

5. In opposition, Seattle contends that in making its effective competition claim, Summit inappropriately relies on aggregate subscriber and household data for both the "Central District" and the "Downtown Business District." Seattle states that it did not request certification for the "Downtown Business District." In addition, it claims that the "Central District" and the "Downtown Business District" are two separate franchise areas. When Summit's penetration level is calculated based solely on the "Central District," argues Seattle, Summit's penetration level is actually 49%.

6. In reply, Summit disputes Seattle's claim that it inappropriately relied on data for two separate franchise areas to support its effective competition claim. It argues that the definition of a "franchise area" encompasses all areas within a city which it has been authorized to serve or "could reasonably expect to be allowed to serve based on the city's past practice. . . ." Thus, it suggests that, for purposes of determining effective competition, its franchise area is both the "Central District" and the "Downtown Business District."

DISCUSSION

7. Cable operators have the burden of rebutting the presumption that their cable system does not face effective competition.[18] Based on the evidence presented, we find that Summit has failed to meet this burden and, therefore, its petition is denied.

8. In its *Rate Order*, the Commission stated that effective competition must be demonstrated on the basis of the franchise area.[19] In its *First Order on Reconsideration*, the Commission defined a "franchise area" as "the area a system operator is granted authority to serve in its franchise."[20] Thus, where a cable system serves more than one separate area, it must demonstrate that effective competition exists in each separate area. Here, Seattle granted Summit a separate franchise to serve the "Central District" which is a separate franchise district." The authority to serve the "Central District" is separate from Summit's authority, granted by street permits, to serve portions of the "Downtown Business District." Further, the "Central District" is the only area served by Summit for which Seattle has requested certification.[21] In light of these facts, we find that Summit inappropriately relied upon consolidated subscriber and household data for both franchise districts in support of its effective competition claim. Rather, Summit, in order to demonstate effective competition, was required to use data solely for the "Central District." In light of Summit's failure to do so, we deny its petition.[22]

ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Summit Communications, Inc. challenging the certification of the City of Seattle to regulate Summit's basic cable rates IS DENIED.

10. IT IS ORDERED that the automatic stay imposed by Section 76.911(c) of the Commission's Rules, as amended, 47 C.F.R. § 76.911(c) IS TERMINATED.

11. IT IS FURTHER ORDERED that Summit Communications, Inc. SHALL FILE its rate justifications on the appropriate forms with the City of Seattle within 30 days of the release date of this *Memorandum Opinion and Order* or 30 days of the date notice is given by the City of Seattle that it is regulating rates, whichever is later.

12. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's Rules, as amended, 47 C.F.R. § 0.321.

---

[15] 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

[16] This number is based on the number of housing units (occupied and vacant housing units), in both franchise districts (from 1990 census tract data) in addition to the number of businesses as represented by the business listings in the US West Reverse Directory of Business Phones.

[17] Summit argues that businesses are required to be included in the measurement of "potential customers" and subscribers. Seattle disagrees with Summit's contention, noting the Commission's recent discussion which clarifies that the definition of the term "households" includes only full-time occupied housing units. *Third Order on Reconsideration*, in MM Docket Nos. 92-266 and 92-262, 59 FR 17,961, 17,962 (April 15, 1994) (*"Third Recon. Order"*). Summit replies that Section 76.905(c) of the Commission's Rules requires that commercial entities be counted. Noting the Commission's request for comment on the issue of commercial rates in its *Second Order on Reconsideration*, Summit argues that since the Commission considers rates charged to commercial subscribers to be regulated, it certainly intends that commercial entities be counted for purposes of effective competition. *See Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 59 FR 17,943, 17,951 (April 15, 1994). We need not reach this issue to render a decision on this case. However, we note that the test for effective competition is based on the term "household." As the Commission stated in its *Third Recon. Order*, "[a]s used in the Cable Act, we presume that Congress did not intend "households" to have a different meaning than in the 1990 Census . . . ." The 1990 Census does not include commercial or non-residential entities in its count of "households."

[18] 47 C.F.R. § 76.910(b)(1).

[19] *Rate Order*, at 5672.

[20] *First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, in MM Docket No. 92-266, 9 FCC Rcd 1164, 1180 (1994).

[21] Even if Seattle had requested certification for the "Downtown Business District," this area, as a separate franchise area, would be treated separately from the "Central District" for purposes of determining the existence of effective competition.

[22] The relevant franchise for purposes of this case is the "Central District." In this regard, we note that in order to demonstrate effective competition for this district, Summit must demonstrated that its number of full-time subscribers in the "Central District" in relation to the number of full-time occupied housing units in the "Central District" results in a penetration level of less than 30%. *See Third Recon. Order*, at 17,962.

13. Interested parties may refer questions to Lisa M. Higginbotham or Emerson G. Yearwood of the Consumer Protection Division, Cable Services Bureau at (202) 416-0856.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Application of	File No. 568885
Robert Johnson	Station WNZH 441
for an 800 MHz SMR Station	
at Hemet, California	

MEMORANDUM OPINION AND ORDER

Adopted: August 31, 1994; Released: September 12, 1994

By the Deputy Chief, Licensing Division, Private Radio Bureau:

1. On December 9, 1992, Advanced Mobilecomm of Southern California, Inc. ("AMI") filed a Petition for Reconsideration and, in the alternative, an Application for Review of the denial of its earlier Petition for Reconsideration.[1] In each pleading, AMI disputes the grant of a new SMR license on May 6, 1992 to Robert Johnson.

2. Johnson's grant authorizes a new five channel station located 28.9 miles from AMI's station which includes three channels offset 12.5 kHz from three utilized by AMI.[2] Because SMR channels are 25 kHz wide, the channels authorized to AMI and Johnson overlap. AMI asserts that Johnson's use of the overlapping channels results in unworkable interference rendering the channels commercially inoperable.

3. The 12.5 kHz offset between channels in the 800 MHz band is unique to stations licensed in the United States/Mexico border area.[3] In 1982, the Commission provided for the licensing of 200 channels in the border area[4] offset from the SMR channels available in the non-border area ("primary channels"). This special allocation alleviated a channel shortage in the border region where certain channels were unavailable due to agreements with Mexico. *Amendment of Part 90 of the Commission's Rules to Release Spectrum in the 806-821/851-866 MHz Bands*, 90 FCC 2d 1281, 1332 (1982). AMI's station is in the border area near San Diego and operates on the offset channels. Johnson's grant authorizes a station north of the border area utilizing primary channels.

4. In the rule making establishing the offset channels, the Commission discussed various comments relating to the interference relationship between the primary and offset channels. The Commission did not provide the offset channels co-channel protection from primary channels. It noted, however, Motorola's comments concerning the design criteria necessary to protect systems from undesired carrier signals in order to operate on an offset channel.[5]

5. At the time Johnson applied for this station, the Commission had not specified criteria for protecting offset channels from primary channels. In particular instances, the Commission recognized the need to provide protection to licensees operating on offset channels. For example, in *Requests for Waivers of Part 90 of the Commission's Rules by the County of San Bernardino to operate a countywide public safety communications system in the 800 MHz band*, 2 FCC Rcd 6721 (1987) (*San Bernardino*), the Private Radio Bureau provided for full co-channel protection for offset frequencies utilized by *San Bernardino* which are coordinated by the Commission. *Id.* at 6722. The same order charged the coordinators with determining the necessary channel separation on coordinated frequencies. *Id.* (footnote 16).

6. On reconsideration the Commission affirmed the decision of the Private Radio Bureau stating:

> In adjudicating any license application, the Commission may on an *ad hoc* basis, grant a license and accord the licensee whatever operating rights, including protection from objectionable interference, the Commission determines in the public interest.

3 FCC Rcd 6033, 6035 (1988) (*San Bernardino Reconsideration*). The Commission then affirmed the application of full co-channel separation criteria to the San Bernardino system.[6]

7. During the pendency of the challenges to Johnson's grant the Commission has reassessed the public interest with respect to protection of offset operations. In September, 1993, the Commission changed its rules to provide full co-channel interference protection between offset channels and primary channels. *In the Matter of Co-Channel Protection Criteria for Part 90, Subpart S Stations Operating Above 800 MHz*, 8 FCC Rcd 7293, 7298 (1993). The rule change is prospective, but is persuasive guidance in assessing the public interest in this licensing adjudication.

8. AMI argues that the public interest requires that we reconsider the Johnson grant because the two stations cannot operate without harmful interference. AMI has submitted engineering studies demonstrating that the protection afforded by the offset is insufficient because Johnson seeks to operate less than thirty miles away. AMI claims that it has been experiencing harmful interference ever since Johnson began operation.[7]

---

[1] Letter from Deputy Chief, Licensing Division, Private Radio Bureau to Robert B. Kelly, Esquire (November 9, 1992). Johnson's license was granted on May 6, 1992. AMI filed its first petition for reconsideration on June 5, 1992. AMI has consistently filed timely challenges to the Johnson grant. The license has now been assigned to Wayne Goff conditioned on the outcome of this proceeding.

[2] Johnson's grant includes frequencies 863.3125 MHz, 864.3125 MHz, and 865.3125 MHz. AMI is licensed to use frequencies 863.3000 MHz, 864.3000 MHz, and 865.3000 MHz. AMI does not dispute Johnson's authorization to use the remaining two channels.

[3] Offset channel use in any other location may be permitted by a rule waiver.

[4] The border area is a region extending 110 km (68.4 miles) from the Mexican border.

[5] *Id.* at 1333, note 102.

[6] *Cf.* further reconsideration, 4 FCC Rcd 3830 (1989).

[7] AMI filed an Emergency Motion to Stay on August 7, 1992

9. A primary regulatory concern in channel reuse planning is to provide new licenses such that they do not cause and are not subject to harmful interference. More than ten years of experience with offset channels has convinced the Commission that these channels should be afforded full co-channel protection. As noted above, the Commission amended rule Section 90.621(b)(7), 47 C.F.R. §90.621(b)(7), to provide this protection: "New applications for frequencies in this band for stations adjacent to the U.S./Mexico border area must comply with the co-channel separation provisions of this section." *Id.* at 7302. This amendment is, by its terms, not retroactive.

10. AMI argues that even if the rules do not provide protection for its station, the grant is not in the public interest. When Johnson was licensed, his station was in compliance with the Commission's rules. At that time, rule Section 90.621(b) provided that only co-channel interference would be considered in determining channel reuse.

11. In this case AMI has made a convincing showing that Johnson's station is too close to coexist (on the three shared channels) without harmful interference. In light of AMI's "engineering showing, we find that it is not in the public interest to permit Johnson to operate a station at a location which will cause unworkable harmful interference. This is the type of situation the Commission anticipated in the *San Bernardino Reconsideration* when it stated that the public interest may require individual assessment in licensing adjudications.

12. IT IS ORDERED THAT pursuant to the authority contained in § 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 309, the portion of the license grant to Edward Johnson, Station WNZH 441, for frequencies 863.3125 MHz, 864.3125 MHz, and 865.3125 MHz is hereby set aside.

FEDERAL COMMUNICATIONS COMMISSION

W. Riley Hollingsworth
Deputy Chief, Licensing Division
Private Radio Bureau

due to the harmful interference AMI was experiencing. This motion was mooted by the denial of AMI's petition for reconsideration. *See*, footnote 1 *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Niagara Mohawk Power
Corporation Call Signs
WPCW 863, WPCX 746, WPCX
405, WPCX 407, WPCX 408,
WPCV 961, WPCV 948 and WPCV 949

Request for Extension of Time
to construct and operate its
220-222 MHz Land Mobile Systems

ORDER

Adopted: August 31, 1994; Released: September 12, 1994

By the Deputy Chief, Licensing Division, Private Radio Bureau:

1. On May 10, 1994, Niagara Mohawk Power Corporation filed a request for an extension of time to meet the construction deadlines relating to its non-nationwide 220-222 MHz land mobile systems. The Commission's rules allow the licensees eight months to construct their systems. 47 C.F.R. § 90.725(f). Niagara seeks to have its deadline extended on stations above Line A and two related stations below Line A extended until twelve months after Public Notice of the terms of a U.S./Canadian agreement are announced. For the reasons that follow, the requested extension is granted in part.

2. The Commission, by Public Notice, granted an extension of the eight month construction deadline for local 220-222 MHz licensees because the Commission's Report and Order promulgating regulations for the use of the 220-222 MHz band by land mobile users was the subject of an appeal that placed a cloud over their license grants.[1] *Public Notice*, 57 Fed. Reg. 41935, 41936 (September 14, 1992). This deadline was further extended due to equipment availability problems. *Order, Amendment of Part 90 of the Commission's Rules To Provide For the Use of the 220-222 MHz Band by the Private Land Mobile Services*, 9 FCC Rcd 1739 (1994). Niagara now seeks an extension due to the lack of finality of negotiations with Canada.

3. The Commission's order establishing the rules governing the 220-222 MHz band indicated that applicants seeking authorizations above Line A or below Line B would receive licenses subject to coordination with Canada and Mexico, respectively.[2] Use of these frequencies for this service has been coordinated with Mexico and tentatively coordinated with Canada. Negotiations with Canada seeking an agreement as to the use of this spectrum in the Canadian border area continue.

4. Licensees for stations above Line A are subject to certain risks relating to coordination with Canada. We recognize that the investment Niagara Mohawk will have to make in order to construct the above-captioned stations is substantial. Because negotiations with Canada may take some time to complete, we will allow Niagara additional time to construct its stations rather than requiring it to risk substantial sums constructing a system, the continued viability of which is subject to conditions beyond Niagara Mohawk's control.[3] Niagara's request for an extension of twelve months beyond an agreement with Canada is excessive in light of the eight month construction requirement imposed on other licensees. We will extend Niagara's construction deadline eight months beyond the announcement of an agreement with Canada.

5. For the above reasons, IT IS ORDERED THAT the construction deadline by which Niagara Mohawk Power Corporation is required to build the above captioned 220-222 MHz land mobile systems pending the outcome of ongoing negotiations with Canada is extended until eight months from the date the terms of an agreement with Canada are released.

FEDERAL COMMUNICATIONS COMMISSION

W. Riley Hollingsworth
Deputy Chief, Licensing Division

---

[1] Evans v. Federal Communications Commission, Case No. 92-1317 (D.C. Cir. filed July 30, 2992).

[2] Memorandum Opinion and Order, In the matter of Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Services, 7 FCC Rcd 4484 (1992).

[3] We previously granted a similar extension request. Letter from Terry Fishel, Chief, Land Mobile Branch, Licensing Division, Private Radio Bureau to Eugene Maliszewskyj dated April 18, 1994 granting extension request made by Whidbey Telephone Company.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 12, 1994

COMMENTS SOUGHT ON ALASCOM, INC
COST ALLOCATION PLAN
CC DOCKET NO. 83-1376, RM 4436
AAD 94-119

PUBLIC COMMENT INVITED

Comment Date: October 10, 1994
Reply Date: October 25, 1994

On August 29, 1994 Alascom Inc. ("Alascom") filed a Cost Allocation Plan ("CAP") pursuant to the Ordering Clause in paragraph 58 of the Commission's *Memorandum Opinion and Order*, FCC 94-116, released May 24, 1994, in CC Docket No. 83-1376, RM 4436. On September 1, 1994 Alascom filed a letter to provide further clarification of the definitions on the "Bush" and "non-Bush" areas of Alaska used in the CAP filing.

Parties may file comments on Alascom's CAP filing and the **September 1, 1994** letter no later than **October 10, 1994**. Replies should be filed by October 25, 1994. Comments should reference AAD 94-119. Six (6) copies of each pleading should be sent to Kenneth M. Ackerman, Chief, Accounting Systems Branch, Common Carrier Bureau, 2000 L St., N.W., Room 812, Washington, D.C. 20554 and one (1) copy of each pleading should also be sent to the International Transcription Service (ITS), 2100 M St., N.W., Suite 140, Washington, D.C. 20037, (202) 857-3600. Copies of Alascom's CAP filing and the September 1, 1994 letter are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L St., N.W., Suite 812, Washington, D.C. Copies are also available from ITS.

This is a non-restricted proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See 47 C.F.R. §§1.1200-1.1216.

For further information, contact Kenneth M. Ackerman at (202) 418-0810.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-504

In re Applications of

PLAYA DEL SOL BROADCASTERS — File No. BPH-890501MJ

MICHAEL DURDEN — File No. BPH-890503MP

For Construction Permit for a
New FM Station on Channel 249A
in Mecca, California

Appearances

Dennis J. Kelly, Esquire, on behalf of Playa Del Sol Broadcasters; and *Eric S. Kravetz, Esquire*, on behalf of Michael Durden.

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE ARTHUR I. STEINBERG

Issued: September 2, 1994; Released: September 13, 1994

PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of Playa Del Sol Broadcasters ("Playa") and Michael Durden ("Durden" or "M. Durden") for a construction permit for a new FM station on Channel 249A in Mecca, California. By *Initial Decision*, 7 FCC Rcd 8595, released December 17, 1992, the application of Durden was granted and that of Playa denied.

2. Exceptions to the *Initial Decision* were filed by Playa, and by *Memorandum Opinion and Order*, 8 FCC Rcd 7027, released September 21, 1993 ("*MO&O*"), the Review Board remanded this proceeding for further hearing on the following issue:

> To determine whether Michael Durden is financially qualified to construct and operate the proposed Mecca application for a new FM station.

The Board assigned both the burden of proceeding and the burden of proof on this issue to Durden. (*MO&O* at para. 11.)

3. A prehearing conference was held on September 30, 1993, and the hearing on the added issue was held in Washington, D.C., on April 12, 1994. The record was closed at the conclusion of the April 12, 1994, hearing session. (Tr. 1104; *Order*, FCC 94M-257, released April 14, 1994.

4. Proposed findings of fact and conclusions of law were filed by each applicant on June 15, 1994. Reply findings and conclusions were filed on July 5, 1994.

FINDINGS OF FACT

The Union Bank Letter

5. M. Durden is an applicant for a permit to construct a new FM broadcast station at Mecca, California. Before filing his application, he drafted a budget for the construction and initial operation of the proposed station and discussed meeting those expenses with his father, Earnel Durden ("E. Durden"). (Durden Ex. 11, p. 1.) Budgeted costs were approximately $286,500, and E. Durden agreed to help finance his son's project by, preferably, guaranteeing a bank loan to the extent M. Durden could obtain one, or by directly lending him the required funds. (Durden Ex. 11, p. 1; Durden Ex. 12, p. 1.)

6. At the time of these discussions, M. Durden was a participant in the application of Spirit Broadcasting, a California Limited Partnership ("Spirit"), which was seeking an FM construction permit in Montecito, California. (Playa Ex. 6.) E. Durden had earlier agreed to lend his son $120,000 to help meet estimated post-grant costs of construction and initial operation of that proposed station. (Durden Ex. 12, p. 1.) E. Durden had no problem with offering assistance for the Mecca application as well because he knew that, as of March 1989, he had available over $600,000 in liquid assets in the form of bank deposits and certificates of deposit, his current income exceeded his current liabilities, and he had no other significant financial obligations. (*Id.*)

7. About the time of these discussions, E. Durden was introduced to Stephen Andrews at a social gathering, and they had a brief conversation. (Durden Ex. 12, p. 2; Durden Ex. 13, p. 1.) Andrews was Assistant Vice President of Union Bank in San Diego, California, and Manager of the bank's Euclid & Federal Office. (Durden Ex. 13, p. 1.) E. Durden was not a personal friend of Andrews, nor was he a customer or borrower of Union Bank. (Durden Ex. 13, p. 1; Tr. 1080.)

8. After this encounter, E. Durden called Andrews and visited his office at the bank. At this meeting, E. Durden generally described M. Durden's plans to build and operate a station in Mecca and explained that he, E. Durden, was willing to lend funds to his son and guarantee a bank loan for this project. (Durden Ex. 12, p. 2; Durden Ex. 13, p. 1.) E. Durden questioned whether the bank might make a loan to his son if he provided the required financial backing. (Durden Ex. 13, p. 1.) Having recently been involved in the financing of another broadcast facility, Andrews was generally familiar with what was involved and agreed to discuss the matter further with E. Durden and M. Durden. (*Id.*) They therefore arranged to meet at a local restaurant to go over M. Durden's plans and E. Durden's financial position. (Durden Ex. 13, p. 1.)

9. This meeting, which was held in mid or late March 1989, involved four individuals: M. Durden, E. Durden, Andrews, and Brent Barton, a commercial loan officer at Union Bank whom Andrews asked to attend the meeting in order to help evaluate the proposed project. (Durden Ex. 11, p. 1; Durden Ex. 12, p. 2; Durden Ex. 13, p. 1; Tr. 1049, 1068.) The meeting lasted about one and one-half hours, and covered a variety of topics, including Andrews' own familiarity with financing radio stations, where the station would be licensed, what coverage the station would have, how the proposed technical facilities could be modified after grant to reach a greater population, and the amount of money M. Durden would need to finance the construction and initial operation of the proposed station.

(Durden Ex. 11, pp. 1-2; Durden Ex. 12, p. 2; Durden Ex. 13, p. 1; Tr. 1035, 1037.) M. Durden showed Andrews and Barton the budget he had prepared, which contained a breakdown of various categories of costs. (Durden Ex. 11, p. 2; Durden Ex. 12, p. 2; Tr. 1035-37, 1052.)[1] The men discussed M. Durden's personal background, general knowledge of radio, experience in the broadcast business, and general financial position. (Durden Ex. 11, pp. 1, 8-9; Durden Ex. 13, p. 1; Tr. 1034, 1042, 1081.) The men examined and discussed the personal financial statement of E. Durden and his wife, June Durden ("J. Durden"), which showed cash, money market funds, and certificates of deposit of $580,000, in addition to investments in limited partnerships and real estate. (Durden Ex. 11, p. 2; Durden Ex. 12, pp. 2, 4-6; Durden Ex. 13, p. 1.) M. Durden's financial position was of limited importance to Andrews because the primary discussion concerned E. Durden's ability to provide financial backing for his son. (Durden Ex. 13, p. 1.)

10. During the course of this meeting, M. Durden did not provide Union Bank with revenue projections for the Mecca station or with a written market study of Mecca and the surrounding area. (Tr. 1036-37.) Nor did M. Durden provide anything in writing as to his plans for the proposed station's format, although they discussed orally how the format would be selected. (Tr. 1036.)

11. The personal financial statement of E. and J. Durden, referred to above, was prepared by J. Durden for the purpose of seeking a loan from Union Bank for the Mecca project. (Tr. 1059-60.) J. Durden was not an accountant and E. Durden had no knowledge that the financial statement was prepared according to generally accepted accounting principles. (Tr. 1060.) E. Durden did not have input with respect to what went into the financial statement, but he reviewed it after it was prepared by his wife and believed it to be accurate. (Tr. 1060-61, 1063.) The statement was not provided to an accountant for auditing purposes. (Tr. 1061.) Union Bank did not investigate the figures on this balance sheet, and they were not checked or confirmed with any other source. (Tr. 1083.) The bank did not perform a credit check on either E. or J. Durden (Tr. 1082), and they did not submit a formal loan application to the bank in connection with the Mecca station (Tr. 1083).

12. Based on this meeting, Andrews concluded that M. Durden was a reliable and capable individual, that his initial business plan was reasonable, that the investment seemed prudent, and that E. Durden had the financial resources necessary to assist his son and support a loan from Union Bank. Nothing that had been discussed at the meeting caused Andrews any "concern." Andrews also observed that E. Durden was a reasonable businessman with substantial personal assets who would be available to advise his son. (Durden Ex. 13, p. 2.) Thus, Andrews "felt fairly confident that as long as Mr. [E.] Durden was on the note or was going to be involved in the situation, that we were going to have a fairly prudent loan." (Tr. 1097.)

13. On this basis, Andrews believed a loan application by M. Durden supported by his father's assets would likely be granted by Union Bank. However, Andrews could not guarantee that a loan would be made in the absence of a formal loan application and approval of the bank's loan committee. Andrews made it clear to the Durdens that he could not make a binding commitment at that time, and they acknowledged that anything contained in a letter would not obligate the bank. (Durden Ex. 13, p. 2.)

14. According to Andrews, he discussed his conclusion with Barton, who concurred. Andrews also reviewed the matter with his direct supervisor at the Euclid & Federal Office, who was a member of the bank's loan committee. Andrews believed that this individual also agreed with his conclusions. (Durden Ex. 13, p. 2.)

15. Andrews concluded that a loan of at least $300,000 could be supported by the information which he had on hand, if the information proved accurate at the time a formal loan application was filed.[2] He therefore wrote a letter, dated April 11, 1989, to M. Durden outlining the likely terms of a loan, if such loan were to be made at that time. This letter was intended to assure the Durdens that, based on the information which had been provided to him, a loan would be available, future circumstances permitting. Andrews believed he could fairly state, as a representative of the bank, that the bank intended to make the loan, provided there was no substantial change in the basic information given to him, and the loan committee approved the loan on the basis of information supplied at the time of a formal loan application. (Durden Ex. 13, pp. 2, 5.)

16. Andrews testified that he would not have written such a letter had he not believed that a loan could be made in the future, and would not have done so as a favor or merely to indicate that he would be interested in considering a loan request from a potential customer at a later time. (Durden Ex. 13, p. 2.) Andrews further testified that he was trying to establish a relationship with E. Durden as a "main customer" of the bank. Based on what he saw, Andrews felt that E. Durden would have been a very good potential bank customer. (Tr. 1099.) However, Andrews stated that he would not have issued the letter under consideration had he thought that E. Durden's assets could not have covered the loan. (Tr. 1100.) At the time the letter was written, Andrews had been a banker for 18 years. (Tr. 1096.)[3]

17. Andrews' April 11, 1989, letter was typed on the letterhead of Union Bank, addressed to M. Durden, signed by Andrews in his capacity as Assistant Vice President and Manager of the Euclid & Federal Office, and read as follows (Durden Ex. 11, p. 4; Durden Ex. 13, p. 5; Tr. 1079-80):

> This will confirm that we are familiar with your plans to construct a new FM radio station in Mecca, California. We understand that should the Federal Communications Commission grant your application

[1] This document was later thrown out or discarded. (Tr. 1035, 1052.)

[2] Andrews believed that E. Durden's balance sheet would support such a line of credit if, after a credit check, the information was verifiable. (Tr. 1094.) As noted above, however, no credit check was performed. (Tr. 1082.)

[3] At the time of his testimony in this proceeding (April 12, 1994), Andrews had been a banker for 23 years. (Tr. 1096.) Therefore, as of the date of the bank letter (April 11, 1989), he had been a banker for 18 years.

> for a permit to construct the station, you will require a line of credit of $300,000.00 with which to finance the construction and initial operations of the station.
>
> We would take under consideration such a loan to you or to a corporation owned by you if and when the FCC grants you a permit and if our loan committee approves your loan application at that time. At present, were such a loan to be made, it would likely be for a term of five (5) years, commencing after the first draw on the line of credit has been made. The interest rate would be 14.5% per annum.
>
> The loan would be secured by a lien on all station assets, a pledge of corporate stock if the permit is assigned to a corporation, and the personal guarantees of yourself and your father. In this connection, we have been provided with the personal balance sheets of your father and yourself.
>
> It is understood that this letter does not represent a binding commitment by the bank to make a line of credit discussed above, available to you. A final determination will be made only upon a review of the matter at such time as the FCC has granted you a permit and you have submitted a formal application to the bank for such a line of credit.
>
> We wish you the best of luck and look forward to working with you in the future.

18. Although the letter stated that the bank had been provided with M. Durden's personal balance sheet, M. Durden never gave any document to anyone at Union Bank purporting to be his personal financial statement. (Tr. 1034, 1041, 1081.) Similarly, Andrews had nothing in writing from M. Durden as to his balance sheet or financial condition, and Andrews never ran a credit check or undertook any other financial investigation of M. Durden. (Tr. 1037, 1081-82.) However, as noted above, M. Durden's general financial position was discussed at the meeting with Andrews and Barton. (Durden Ex. 13, p. 1; Tr. 1034, 1042, 1081.) At the time the letter was issued, M. Durden was not a depositor of Union Bank (Tr. 1033, 1080), and had never before borrowed money from that bank (Tr. 1034, 1080). He did not provide the bank with his Social Security number for the purpose of facilitating a credit check (Tr. 1037), and never submitted a formal loan application to Andrews or the bank in connection with the Mecca project (Tr. 1083).

19. M. Durden never specifically asked Union Bank or its representatives to provide him with financing equal to 100 percent of the cost of the Mecca project. (Tr. 1038.) Nor did M. Durden tell Union Bank that he was proposing to provide any assets of his own to the Mecca venture. (*Id.*) Rather, M. Durden believed it was understood that this would be part of the loan. (*Id.*) At the time the bank letter was issued, it was the normal and usual Union Bank practice to require that a borrower put up a percentage of equity in order for the bank to fund a loan application. However, Andrews testified that this practice depended on the loan. For example, Andrews stated that a line of credit could be arranged for 100 percent financing if there was collateral to back it up. (Tr. 1085-86, 1092-93.)

20. As of November 1993, Union Bank had no documents in its possession, custody, or control relating to the April 11, 1989, letter to M. Durden, including loan applications and supporting documentation, documents provided to the bank by M. Durden or E. Durden, or internal bank correspondence, notes, and/or memoranda. A representative of the bank noted that it did not keep old and inactive records, and there was a possibility that the bank may have disposed of any records it may have had pertaining to the Mecca proposal. (Tr. 1028-32.)

21. The April 11, 1989, letter from Union Bank was the sole basis for M. Durden's affirmative financial certification contained in his Mecca FM application. (Tr. 1033.)

The Montecito Financial Plan

22. Spirit's financial plan for the construction and operation of the Montecito station was discussed in detail in the *Initial Decision* in this proceeding. To summarize, Spirit required $30,000 for the pre-grant expenses of prosecuting its application, and an additional $150,000 for the costs of construction and initial operation of the station. (*Initial Decision* at para. 17.) To meet these costs, the two limited partners of Spirit were to contribute $25,000 each ($10,000 toward pre-grant expenses and $15,000 for construction and operation costs), and M. Durden, the general partner of Spirit, was to contribute $10,000 toward pre-grant expenses and an additional $120,000 for construction and operation costs. E. Durden had agreed to lend to M. Durden the $120,000 he required to fulfill that portion of his commitment to Spirit. (*Id.* at paras. 14, 20, 22, and 25.)

The Review Board's Specific Concerns

23. In adding the financial issue against Durden, the Review Board noted that from 1989 to 1992, both the Montecito and Mecca applications were pending before the Commission, and that M. Durden proposed "to participate full time in the management of both the Montecito and Mecca facilities." (*MO&O* at para. 8.) The Board further noted that to finance his portion of the Montecito proposal, M. Durden was relying on a $120,000 loan from E. Durden, and that to finance his Mecca proposal, M. Durden was relying on the Union Bank letter. (*Id.* at para. 10.) With respect to the bank letter, the Review Board stated (*id.* at para. 11):

> Nothing in Durden's showing suggests that the bank was informed of Durden's outstanding and conflicting proposal to manage the Montecito station full time, or his financial plans to construct the Montecito station with $120,000 from his father. Whether the bank was fully informed of these facts, and whether this information would have had an adverse effect on the bank's willingness to provide a reasonable assurance letter, are unresolved questions. Until they are clarified, we cannot conclude that the Mecca and Montecito proposals are distinct and independent, as Durden claims, and not subject to the general rule that an applicant with multiple filings bears the burden of showing that at the time of certification "he was able to meet all of his other outstanding financial commitments and the present broadcast financial proposal." [Citation omitted.] We will, therefore, enlarge the issues and remand the case for a further evidentiary hearing and the adoption of a supplemental initial decision. . . .

24. M. Durden believed that his involvement with the application of Spirit for a new FM station at Montecito was mentioned at the meeting with Andrews and Barton, but they did not discuss it in detail. (Durden Ex. 11, p. 2.) M.

Durden never stated at the meeting that he personally intended to work at the Mecca station on a daily basis, because he had not decided to do so at the time of the meeting, and the bankers never indicated his daily presence at the station was important to them. (Durden Ex. 11, pp. 2-3.)[4]

25. Andrews did not recall any discussion of the subject of M. Durden's daily presence at the Mecca station. However, Andrews did not believe that his presence or lack of presence would have made any difference in his decision to write the April 11, 1989, letter. Andrews was convinced of M. Durden's integrity and intelligence, believed that he had the judgment to hire competent personnel, and was confident that he knew enough about the radio business to oversee the operation of the station whether or not he was present on a daily basis. (Durden Ex. 13, p. 3.)[5]

26. Andrews did not recall discussing at the meeting E. Durden's proposed $120,000 loan for the Montecito station.[6] However, Andrews was certain that this would not have changed his decision to write the April 11, 1989, letter. Andrews explained that, having reviewed E. Durden's financial statement, he clearly had sufficient liquid assets to make a loan to M. Durden for the Montecito station and to support a loan for the Mecca station. (Durden Ex. 13, p. 3; Tr. 1095-96, 1098.)

27. E. Durden also held an interest in the permittee of a new AM station in Commerce City, Colorado, and had committed to invest between $56,000 and $62,500 in that enterprise. According to E. Durden, this investment was discussed at the meeting with Andrews and Barton, but the dollar amount was not mentioned. (Durden Ex. 12, pp. 1-2; Tr. 1071-73.) Andrews testified that, had this been shown as a liability on E. Durden's financial statement, the existence of this commitment, together with E. Durden's commitment to his son's Montecito station, would not have affected his decision to write the April 11, 1989, letter. (Durden Ex. 13, p. 3; Tr. 1095-96.) Andrews believed that there were enough "attachable assets" shown on E. Durden's balance sheet to support both. Andrews defined those assets as something that would provide the bank with a secondary source of repayment, such as a home, automobiles, or certificates of deposit. (Tr. 1096-97.) Andrews did not conduct an independent investigation of what E. Durden's obligations were with respect to Montecito and Commerce City. (Tr. 1091-92.)

CONCLUSIONS OF LAW

28. This proceeding was remanded for further hearing on a financial qualifications issue added by the Review Board against Michael Durden. For the reasons which follow, this issue will be resolved in Durden's favor.

29. Although the financial issue was phrased in broad, general terms, it must be interpreted in light of the facts upon which the Board concluded that substantial questions were raised. *Catamount Broadcasters, Inc.*, 56 FCC 2d 730, 736 n.22 (Rev. Bd. 1975); *Kittyhawk Broadcasting Corporation*, 20 FCC 2d 1011, 1021 (Rev. Bd. 1969). Thus, in remanding this proceeding, the Board raised the following specific questions: (a) Was the bank fully informed of M. Durden's "outstanding and conflicting proposal" to manage the Montecito station full time? (b) Was the bank fully informed of M. Durden's financial plan to construct the Montecito station with $120,000 from his father, Earnel Durden? (c) Would this information have had an adverse effect on the bank's willingness to provide "a reasonable assurance letter" to M. Durden for the Mecca application? and (d) Are the Mecca and Montecito financial plans actually distinct and independent so that M. Durden would not be subject to the general rule that an applicant with multiple filings must show the wherewithal to finance all concurrently?

30. The findings establish, and it is concluded, that Union Bank was *not* informed of M. Durden's proposal to be the full-time manager of the Montecito station, and was *not* fully informed of E. Durden's proposed $120,000 loan to the Montecito applicant. In addition, although not mentioned in the *MO&O* remanding this case, the bank *was* told about E. Durden's commitment to invest in the Commerce City, Colorado, permittee, but no dollar figures were mentioned. The findings also establish, and it is concluded, that none of these matters would have had an adverse effect on the bank's willingness to provide the April 11, 1989, letter to M. Durden.

31. Stephen Andrews, a representative of Union Bank and the author of the letter in question, testified that he did not believe that M. Durden's daily presence at the Mecca station was important to the issuance of the bank letter. On the contrary, after meeting with M. Durden for one and one-half hours, Andrews, who had 18 years experience as a banker, formed the opinion that he had the integrity, intelligence, judgment, and experience to oversee

---

[4] M. Durden's Integration and Diversification Statement in the Mecca proceeding was signed on January 24, 1991, and was filed with the Commission on January 25, 1991. Therein, M. Durden stated that he would be integrated into the management and operation of the Mecca station on a full-time basis. (Official notice taken.)

[5] Playa argues in its proposed findings and conclusions that the following testimony by Andrews conflicts with that cited in the text:

> That whole part of it is so hazy to me, in terms of what was happening. . . . [A]ll I remember is that Michael Durden was not yet fully established in the business and we talked about his training *because I was concerned about who was going to run the station and that kind of thing* . . .

(Tr. 1098, emphasis added.)

Playa's contention is rejected. First, the question Andrews was answering related to whether he specifically recalled discussing at the meeting the loan from E. Durden for the Montecito station. Next, it is clear from Andrews' answer that he was concerned *before* the meeting about M. Durden's ability to run the station, and that they talked about his business and broadcasting experience *at* the meeting. Moreover, it appears from the entirety of Andrews' testimony that he was satisfied with what he learned at the meeting, that he decided to write the bank letter in question, and that he would have done so even if he had been told that M. Durden would not be present at the station on a daily basis.

[6] E. Durden believed that he did tell the bankers at the meeting that he would lend his son the money he needed for the Montecito project, but he could not recall if the specific amount was mentioned. (Tr. 1069-71, 1073-74.) M. Durden testified that his father's agreement to lend funds for the construction and operation of the Montecito station did not come up. (Durden Ex. 11, p. 2.)

the operation of that station even if he were not present on a daily basis. Similarly, E. Durden's other broadcast-related financial commitments were important to Andrews only in the context of what he termed "attachable assets," and Andrews believed that E. Durden's balance sheet showed sufficient assets which could provide a secondary source of repayment for all of his commitments.

32. The findings further establish, and it is concluded, that the Mecca and Montecito financial plans were distinct and independent. To fund the Spirit proposal, M. Durden was relying on $10,000 of his own funds, $50,000 from Spirit's limited partners, and a $120,000 loan from his father. To meet the costs of construction and operation of his Mecca proposal, M. Durden was relying on a $300,000 line of credit from Union Bank, guaranteed by his father. While E. Durden was the common denominator in both the Mecca and Montecito financial plans, the nature of his commitments was distinct and independent, *i.e.*, a loan in one and a guarantee in the other. Moreover, as noted above, E. Durden's obligation to Spirit, even if known by the bank, would not have impacted adversely on its willingness to provide a reasonable assurance letter to M. Durden for his Mecca proposal.

33. Despite the limited nature of the financial issue, Playa contends, for various reasons, that the April 11, 1989, letter does not comport with the Commission's requirements, and that it was written by Andrews as an accommodation. Apart from being beyond the scope of the issue, Playa's arguments are without merit, as will be demonstrated below.

34. In order to be financially qualified, an applicant must have reasonable assurance of having sufficient funds to construct and then operate the station for three months. The Commission has defined "reasonable assurance" as "[a] present firm intention to make a loan, future conditions permitting . . ." *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 167 (1980). Where an applicant relies on a bank loan, it is not the Commission's "practice to second-guess the bank's lending judgment." *Liberty Productions, A Limited Partnership*, 7 FCC Rcd 7581, 7584 (1992); *see also Annette B. Godwin*, 8 FCC Rcd 4098, 4101 (Rev. Bd. 1993); *Harrison County Broadcasting Co.*, 6 FCC Rcd 5819, 5821-22 (Rev. Bd. 1991). Rather, the Commission's concern is whether the bank letter affords reasonable assurance. To determine whether the reasonable assurance standard has been met, the Commission generally considers the following factors: "whether the borrower's qualifications have been preliminarily reviewed by the bank; whether adequate collateral has been demonstrated; and whether the tentative terms are specifically identified and acceptable to the lender as well as the borrower." *Liberty*, *supra* at 7584, citing *Scioto Broadcasters*, 5 FCC Rcd 5158, 5161 (Rev. Bd. 1990).

35. The findings establish, and it is concluded, that the April 11, 1989, letter from Andrews satisfies the "reasonable assurance" standard. That is, the letter represents a present firm intention to make a loan, future conditions permitting. First, it is concluded that the borrower's qualifications were preliminarily reviewed by the bank. M. Durden and E. Durden met with Andrews and Brent Barton, a commercial loan officer, for one and one-half hours. They reviewed and discussed, *inter alia*, where the station would be licensed, its proposed coverage, how coverage could be increased after a grant, the costs of the project, how a format would be selected, M. Durden's personal background, general knowledge of radio, experience in the broadcast business and general financial position, and E. Durden's financial statement. In this connection, Andrews testified that M. Durden's financial position was of limited importance to him because of E. Durden's ability to provide financial backing for his son.

36. Further, based on this meeting, Andrews concluded that M. Durden was reliable and capable, that his business plan was reasonable, that the investment seemed prudent, and that E. Durden had the financial resources to support the loan. In Andrews own words, he "felt fairly confident that as long as Mr. [E.] Durden was on the note or was going to be involved in the situation, that we were going to have a fairly prudent loan." Andrews, therefore, believed that a loan application by M. Durden, supported by E. Durden's assets, would likely be granted by the bank. His belief was confirmed by Barton, and by Andrews' direct supervisor.

37. Consequently, Andrews wrote the April 11, 1989, letter. Andrews testified that he could fairly state, as a representative of the bank, that the bank intended to make the loan, provided there was no substantial change in the basic information given to him, and the loan committee approved the loan on the basis of information supplied at the time of a formal loan application. In this regard, the bank letter stated: "A final determination will be made only upon a review of the matter at such time as the FCC has granted you a permit and you have submitted a formal application to the bank for such a line of credit."

38. Moreover, the bank letter specified the tentative terms of the loan, and it was implicit from the testimony of M. Durden, E. Durden, and Andrews, that those terms were acceptable to the borrower, guarantor, and lender. The letter also specified the collateral, and Andrews believed, based upon a review of E. Durden's balance sheet, that his assets were sufficiently liquid and substantial to support a loan from the bank. Therefore, all three prongs of the test enunciated in *Liberty* have been met.

39. Playa contends that the bank letter is infirm because certain information was not provided to Andrews, no credit check of M. Durden was undertaken, and the Commission's requirements relating to "reasonable assurance" were not discussed with Andrews. Playa specifically refers to the failure of M. Durden to submit to the bank a written personal balance sheet, a formal loan application, revenue projections, a written business plan, and a written format plan. Playa further argues that the bank letter is conditional in nature, only promises to "take under consideration" a loan, and contemplates 100 percent financing which, it alleges, was contrary to bank practice.

40. However, there is no absolute Commission requirement that a bank must always review a borrower's *written* balance sheet. Here, M. Durden's general financial position was discussed with the bankers and, even then, Andrews testified that this was of limited importance because of E. Durden's financial ability to guarantee the loan. In addition, it is abundantly clear that the bankers were looking primarily to E. Durden's financial resources for collateral. They, therefore, reviewed and discussed E. Durden's written financial statement, and concluded that sufficient attachable assets were available to support a loan to his son. Further, there is no firm requirement that a credit check be performed before the issuance of a bank letter and, in this case, there would appear to have been no need to do so given the bank's satisfaction with the proposed collateralization of the loan.

41. Similarly, the Commission has never required that an applicant discuss its "reasonable assurance" standards with a banker, has never required that an applicant submit a formal loan application to a bank before certifying reasonable assurance of financing, and has never required loan committee approval prior to the issuance of a letter. Indeed, bank letters have traditionally and understandably been conditioned upon review of the applicant's financial health at the time the monies are actually advanced. *Merrimack, supra* at 167, and the Commission has approved bank letters, such as the letter in this case, which were conditioned upon the filing of a loan application after the grant of a permit. *E.g., Scioto, supra* at 5159. Bank letters for 100 percent financing have also been approved. *E.g., Colonial Communications, Inc.*, 5 FCC Rcd 1967, 1967-68 (Rev. Bd. 1990). In this connection, Andrews did not testify that bank practice precluded 100 percent financing. Rather, he stated that this practice depended on the loan, and that lines of credit could be arranged for 100 percent financing if there was sufficient collateral.

42. There is also no absolute requirement that revenue projections and *written* business and format plans be submitted to the bank. In this regard, as noted above, M. Durden discussed with the bankers, *inter alia*, where the station would be licensed, its proposed coverage, how coverage could be increased after a grant, the costs of the project, and how a format would be selected, as well as his personal background, general knowledge of radio, and experience in the broadcast business. This information was sufficient to allow Andrews, an experienced banker, to evaluate the project and M. Durden's plans for the station, and determine whether or not to issue a letter. Moreover, Andrews' judgment in this matter was confirmed by Barton, who also attended the meeting with the Durdens, and by Andrews' supervisor. The decision to issue the letter, therefore, should not be "second-guessed." *Liberty, supra.*

43. The fact that the Union Bank letter states that it "will take under consideration" a loan to M. Durden, does not render the letter less than a reasonable assurance of financing. This is so because the bank letter must be read in its entirety, and in light of the circumstances surrounding its issuance, as well as Andrews' testimony as to his intent when writing it. *See Poet's Seat Broadcasting, Inc.*, 78 FCC 2d 1080, 1088 (Rev. Bd. 1980). These factors, which have been detailed above, make it clear that the letter represents a present firm intention to make a loan, future conditions permitting.

44. Playa avers that the bank letter in *Global Information Technologies, Inc.*, 5 FCC Rcd 3385 (Rev. Bd. 1990), which was found not to confer a reasonable assurance of financing, contains language similar to the Union Bank letter. This is erroneous; the language is not even remotely similar. Specifically, the letter in *Global* stated: "Although we have not reviewed the financial information required by us to fully consider a loan commitment, we are seriously interested in exploring ways in which we could assist you in meeting your financial needs." It is, therefore, clear on the face of the *Global* letter that the bank had not even seen the necessary financial data prior to the issuance of the letter and that the bank was merely interested in exploring a loan at some time in the future. The facts of the instant case are clearly different.

45. Playa also maintains that the bank's reliance on the financial statement of E. and J. Durden was misplaced because it was not prepared by an accountant, audited, or independently checked, and because no credit check of E. and J. Durden was performed. However, there is no Commission requirement that any of this be done. Likewise, the Commission has not held that a bank may not rely on a financial statement without first undertaking an independent investigation or credit check before issuing a reasonable assurance letter. Here, it is clear that Andrews reviewed and discussed the financial statement of E. and J. Durden, and was satisfied that sufficient collateral existed to secure the contemplated loan.

46. With regard to Playa's assertion that the bank letter was written as an accommodation, Andrews testified that he would not have issued the April 11, 1989, letter had he not believed that a loan could be made in the future, and would not have done so as a favor, or to indicate that he would merely be interested in considering a future loan request. While admitting that he was trying to establish a customer relationship with E. Durden, Andrews also testified that the letter would not have been written had he thought E. Durden's assets could not have covered the loan.

47. Andrews' testimony on this matter is credible, and is completely supported by and consistent with the circumstances surrounding the issuance of the letter. Andrews met with the Durdens for one and one-half hours. He brought Barton, a commercial loan officer, with him to the meeting to help evaluate the venture. He later discussed the proposal with his supervisor, who was on the bank's loan committee, and with Barton. Had the letter been a mere accommodation, these actions would have been superfluous. Further, Andrews' testimony is corroborated by the financial statement of E. and J. Durden, which appears to show sufficient assets to collateralize the proposed loan. Moreover, Andrews did not dissemble when answering questions, exhibited no repeated failures of recollection when the facts might have been adverse to his position, and his testimony was internally consistent. In addition, Andrews had no motive to perjure himself, readily agreed that the bank letter inaccurately stated that he had been provided with M. Durden's personal balance sheet, and candidly admitted that he wanted to do business with E. Durden. The fact that Andrews wished to establish a customer relationship with E. Durden does not mean that Union Bank would not make a loan to M. Durden, and does not, in and of itself, render the bank letter an accommodation.

48. The cases cited by Playa in support of its contentions are distinguishable from the instant case. In *REM Malloy Broadcasting*, 8 FCC Rcd 7923 (Rev. Bd. 1993), the bank letter did not include any consideration of collateral, "[an] element critical to an informed meeting of the minds between borrower and lender," and the applicant provided no balance sheet reflecting his personal financial situation to the bank. Here, by contrast, M. Durden's general financial position was discussed with the bankers. E. Durden's

---

Once again, it must be emphasized that M. Durden's financial position was of limited importance to the bank because of the guarantee of his father.

written financial statement was reviewed and discussed, a determination was made by the bank that a loan guaranteed by the assets of E. Durden was prudent, and the collateral was specified in the bank letter.

49. In *Evansville Skywave, Inc.*, 9 FCC Rcd 2539 (1994), there was no individualized consideration of the applicant's proposal by the bank. On the contrary, the bank had no information at all from which to decide that a loan would be forthcoming, had not reviewed the financial standing of the principals involved for at least one year, did not consider the particular financial requirements for the station, and was not even aware of how the facility would be owned after it went on the air. In addition, there had been no meaningful contact between the prospective applicant and bank personnel, and the amount of the loan specified in the bank letter bore no relationship to the costs to be incurred by the applicant. The facts of this case are obviously and starkly different, and reflect careful consideration by Union Bank of the particular proposal of the applicant.

50. Finally, in *Shawn Phalen*, 5 FCC Rcd 53 (Rev. Bd. 1990), the applicant never submitted to the bank, either orally or in writing, the underlying data from which it could seriously consider any prospective loan request, including a business plan, cost estimates, a personal financial statement, or other information concerning the applicant's financial condition, assets or net worth. Further, the banker admitted that in providing the applicant with a letter, he did so as an accommodation to a potential customer. *Shawn Phalen*, 5 FCC Rcd 2622, 2623-24 n.2 (Rev. Bd. 1990). In the instant case, the underlying data was furnished, discussed, and considered before the issuance of the bank letter, and the banker credibly testified that he would not have issued the letter as a favor, or merely to indicate some interest in considering a future loan request.

ULTIMATE CONCLUSION

51. In sum, it has been concluded that the Mecca and Montecito financial plans are distinct and independent, and that the April 11, 1989, letter to M. Durden from Union Bank provides "reasonable assurance" of financing for the Mecca facility. Indeed, it appears that M. Durden did everything required of a borrower to obtain a loan from Union Bank that he could do prior to receiving a construction permit from the Commission. *See Welch Communications, Inc.*, 8 FCC Rcd 1285, 1285-86 (1993). It is, therefore, ultimately concluded that M. Durden is financially qualified to construct and operate his proposed FM station in Mecca, California.

Accordingly, IT IS ORDERED that, unless an appeal from this Supplemental Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules, the financial issue added by the Review Board against Michael Durden IS RESOLVED in his favor.[8]

FEDERAL COMMUNICATIONS COMMISSION

Arthur I. Steinberg
Administrative Law Judge

[8] In the event exceptions are not filed within 30 days after the release of this Supplemental Initial Decision, and the Commission does not review the case on its own motion, this Supplemental Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d) of the Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Telecommunications
Petition for Limited Waiver of
Network Disclosure Requirements

MEMORANDUM OPINION AND ORDER

Adopted: September 6, 1994; Released: September 6, 1994

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. In this order we grant, in part, the petition filed by BellSouth Telecommunications, Inc. (BellSouth) seeking a limited waiver of the notification period contained in the Commission's network disclosure rules. BellSouth requests the waiver in order to provide a new video transport service to the Federal Aviation Administration (FAA) in BellSouth's service region that would enhance the FAA's air traffic control capabilities.[1] The special circumstances set forth in BellSouth's petition establish good cause for approval of the limited waiver for service to Jacksonville and Pensacola, Florida.[2] We deny BellSouth's request for a blanket waiver in order to furnish this service at other unspecified locations in its service territory in the future. If the FAA requests this service at additional locations prior to the expiration of the notification period, BellSouth has the right to seek an additional limited waiver of our rules at that time.

II. BACKGROUND

2. The Commission requires the Bell Operating Companies (BOCs) to comply with certain network disclosure requirements to help ensure that telecommunications manufacturers, vendors, and providers can obtain, on a nondiscriminatory basis, technical and marketing information about any new or modified network interface or service that will affect interconnection to the network.

3. The *BOC CPE Relief Order* requires that the BOCs either: 1) certify that they will not engage in customer premises equipment (CPE) research, development, or design, and will follow the *Computer II*[3] network disclosure rules;[4] or 2) notify the CPE industry that a new or modified network service is under development at the make/buy point,[5] and provide technical and market information relating to the new product or modified network service to the public twelve months before the service is introduced.[6] When the make/buy point occurs less than twelve months before the service can be introduced, public disclosure must occur at the make/buy point, but not less than six months before the introduction of the service.[7] Similar network disclosure rules were required in *Computer III*[8] for changes in BOC networks or new network services that affect the interconnection of enhanced services with the network. Finally, all carriers are subject to the network disclosure requirements of Sections 68.110 (a) and (b) of the Commission's rules.[9] Pursuant to these sections, all carriers must disclose network information to the public and provide adequate notice of certain changes before the implementation of a new or modified network service.

III. PETITION

4. BellSouth states that the FAA has requested a specialized video transport service that will improve the quality of video images appearing on air traffic control screens.[10] In order to provide the service to the FAA, however, BellSouth states that it has to use a new interface.

---

[1] BellSouth Petition for Limited Waiver, June 28, 1994. Pleading Cycle Established for Comments on BellSouth's Petition for Limited Waiver of Network Disclosure Rules, CC Docket No. 88-2, DA 94-850, August 4, 1994. No comments were received regarding the BellSouth Petition.

[2] *See* 47 C.F.R. § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

[3] Amendment of Section 64.702 of the Commission's Rules and Regulations (*Computer II*), 77 FCC 2d 384 (1980), *modified on recon.*, 84 FCC 2d 50 (1981) (*Reconsideration Order*), *modified on recon.*, 88 FCC 2d 512 (1981) (*Computer II Further Reconsideration Order*), *affirmed sub nom.*, Computer and Communications Industry Association v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[4] *Computer II Reconsideration Order*, 84 FCC 2d 50 (1981) at 82, para. 95; Furnishing of Customer Premises Equipment by the Bell Operating Companies and the Independent Telephone Companies, Report and Order, 2 FCC Rcd 143, 151 (1987) (*BOC CPE Relief Order*), *recon.*, 3 FCC Rcd 22 (1987).

[5] The make/buy point is the time at which the BOC decides to make itself, or procure from an unaffiliated company, any product the design of which affects or relies on the network interface. C.F.R. § 64.702(d)(2); Computer and Business Equipment Manufacturers Association Petition for Declaratory Ruling Regarding Section 64.702(d)(2) of the Commission's Rules and Policies of the Second Computer Inquiry, 93 FCC 2d 1226, 1238, 1244-5 (1983) (*Disclosure Order*) at para. 36, 58-9; Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Services by the Bell Operating Companies, 95 FCC 2d 1117, 1140 (1983) (*BOC Separation Order*) at para. 60.

[6] *BOC CPE Relief Order*, 2 FCC Rcd at 151, paras. 53-4 & n.132.

[7] *Id.*

[8] Amendment of Section 64.702 of the Commission's Rules and Regulations (*Computer III*), Phase I, 104 FCC 2d 958 (1986) (*Phase I Order*), *recon.*, 2 FCC Rcd 3035 (1987) (*Phase I Reconsideration Order*), *further recon.*, 3 FCC Rcd 1135 (1988) (*Phase I Further Reconsideration Order*), *second further recon.*, 4 FCC Rcd 5927 (1989) (*Phase I Second Further Reconsideration, Phase I Order* and *Phase I Reconsideration Order vacated*, California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Phase II, 2 FCC Rcd 3072 (1987) (*Phase II Order*), *recon.*, 3 FCC Rcd 1150 (1988) (*Phase II Reconsideration Order*), *further recon.*, 4 FCC Rcd 5927 (1988) (*Phase II Further Reconsideration Order*), *Phase II Order vacated*, California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceeding, 5 FCC Rcd 7719 (1990) (*ONA Remand Order*), *recon.*, 7 FCC Rcd 909 (1992), *pets. for review denied*, California v. FCC, 4 F.3d 1505 (9th Cir. 1993); Computer III Remand Proceeding: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991) (*BOC Safeguards Order*), *pets. for recon. pending, pets. for rev. pending*, California v. FCC, No. 92-70083 (9th Cir. filed Feb. 14, 1992).

[9] 47 C.F.R. §§ 68.110(a) and (b).

[10] BellSouth Petition at 2.

BellSouth asserts that it disclosed the new network interface specifications for the video transport service on June 15, 1994, and that without the waiver it will be unable to provide the new service to the FAA at any location until the network disclosure period ends on December 15, 1994. BellSouth notes that the Commission previously granted a waiver of the network disclosure requirements to US West to provide a similar service to the FAA.[11]

5. According to BellSouth, the requested service is a stand-alone video transport service and will not include CPE or enhanced services. BellSouth argues that a waiver of the six month period for notification in this situation will neither violate the spirit of the network disclosure rules, nor provide an advantage to BellSouth.[12] Therefore, BellSouth argues, the waiver is in the public interest, and there is good cause to waive the minimum six month notice period requirement.[13]

6. Although BellSouth states that the FAA has identified Jacksonville and Pensacola, Florida as sites at which it wants service as soon as possible, BellSouth requests a waiver that is broad enough to cover all sites within its region that the FAA may identify as needing the new service before the end of the network disclosure notification period.[14]

IV. DISCUSSION

7. We find that granting BellSouth's petition for a limited waiver of the notification period specified in the applicable network disclosure rules to provide service to the FAA in Jacksonville and Pensacola, Florida is in the public interest. The Commission may waive any provision of its rules or orders if good cause is shown.[15] A showing of good cause requires the petitioner to demonstrate special circumstances that warrant deviation from the rules and to show how such deviation would serve the public interest.[16] The record indicates that the video transport service requested by the FAA will provide air safety improvements that are needed at these locations. For example, BellSouth states that this video transport service is particularly useful for air traffic controllers to properly separate arriving and departing aircraft in inclement weather.[17] Moreover, BellSouth's petition was accompanied by letters of support from the FAA, the National Air Traffic Controllers Association, and Congressperson Tillie K. Fowler regarding the need for the service in these locations. Finally, no party filed comments on or objected to the waiver request.

8. We find that a limited waiver is necessary to achieve the substantial public interest benefits that would result from enhancing the FAA's air traffic control capability at Jacksonville and Pensacola, Florida. We further conclude that a limited waiver in these circumstances will not undermine the Commission's network disclosure rules. Accordingly, we grant BellSouth's request for a limited waiver of the network disclosure rules to provide the FAA with video transport service in Jacksonville and Pensacola, Florida.

9. BellSouth, however, has not justified a waiver of the network disclosure period to provide the FAA with the new video transport service at other unspecified locations in BellSouth's service region. We conclude that any waiver of the network disclosure requirements must be narrowly tailored to preserve the effectiveness of the network disclosure requirements. In this case, since the FAA has not requested this service at any other location of BellSouth's service territory, we find that BellSouth has failed to show that special circumstances currently exist that would justify a blanket waiver. Accordingly, we deny BellSouth's request for a limited waiver to cover unspecified sites that the FAA may in the future identify as needing this new service before the end of the network disclosure period. BellSouth may, however, request waivers for additional sites with similar circumstances as those for which we grant waivers in this order, once they are identified by the FAA.

V. ORDERING CLAUSES

10. Accordingly, IT IS HEREBY ORDERED, that pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R §§ 0.91 and 0.291, BellSouth's Petition for Waiver IS GRANTED IN PART, as described in this order, and is otherwise DENIED.

11. IT IS FURTHER ORDERED that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M. H. Wallman
Chief, Common Carrier Bureau

---

[11] US West Communications, Inc., Petition for Limited Waiver of Network Disclosure Requirements, 6 FCC Rcd 3398 (1991) (*US West Waiver Order*), 6 FCC Rcd 5057 (1991). In the *US West Waiver Order*, the Commission granted US West a limited waiver to provide video transport service to the FAA for the Special Olympics in July 1991.

[12] BellSouth Petition at 3.

[13] *Id.* at 3, 5.

[14] *Id.* at 2, n.3.

[15] 47 C.F.R. § 1.3.

[16] *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[17] BellSouth Petition at 4.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HUTCHENS COMMUNICATIONS, INC.

v. CSR-4230-P

TCI CABLEVISION OF GEORGIA, INC.

Leased Access and Program Access Complaint Pursuant to 47 C.F.R. §§ 76.970, 76.971, 76.975 and 76.1001

MEMORANDUM OPINION AND ORDER

Adopted: September 2, 1994; Released: September 6, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. The Commission has before it what is appropriately described as a combined program access and leased access complaint filed by Hutchens Communications, Inc., ("Hutchens") a video production company located in Valdosta, Georgia, against TCI Southeast, Inc. and its subsidiary, TCI Cablevision of Georgia, Inc. (collectively, "TCI"). Hutchens alleges that TCI inappropriately charged it a leased access fee for carriage of its local origination cable channel known as The Welcome Channel ("TWC") in violation of the Commission's rules set forth in 47 C.F.R. §§ 76.970, 76.971 and 76.975. Hutchens also alleges that by requiring an access fee as a condition for carriage of TWC, and through other alleged conduct, TCI engaged in unfair practices prohibited by Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),[1] and proscribed by the Commission's implementing regulations, specifically 47 C.F.R. § 76.1001. Hutchens requests that the Commission: (i) order TCI to reinstate carriage of TWC; (ii) establish the reasonable access rate to be charged to Hutchens, if any, for carriage of TWC; and (iii) institute an inquiry into the alleged unfair trade practices undertaken by TCI.

2. Based on the record and pursuant to the criteria set forth in the 1992 Cable Act and the Commission's implementing regulations, the Commission concludes that both the leased access and program access components of Hutchens' complaint should be dismissed. As discussed below, to the extent the complaint challenges TCI's leased access rate, it is untimely filed pursuant to 47 C.F.R. §76.975(d). Furthermore, to the extent the complaint challenges the access rate and other alleged conduct undertaken by TCI as a violation of the Commission's program access rules, Hutchens fails to make the requisite *prima facie* showing required under the Commission's articulated standards for discrimination complaints.[2] Thus, the Commission concludes that the Hutchens complaint should be dismissed.[3]

II. BACKGROUND

3. On October 5, 1992, Congress enacted the 1992 Cable Act, which amended the Communications Act of 1934, in part, by adding new Sections 616 and 628.[4] The 1992 Cable Act also amended Section 612 to expand the Commission's authority to regulate the use of leased commercial access. Section 628 (containing the program access provisions) is intended to increase competition and diversity in the multichannel video programming market and to foster the development of competition to traditional cable systems by prescribing regulations that govern the access by competing multichannel systems to cable programming services. Section 628(b) prohibits "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent" competing distributors from providing programming to their customers.[5] Section 628(c) instructs the Commission to adopt regulations to specify particular conduct that is prohibited by subsection (b).[6] Pursuant to that mandate, on April 1, 1993, the Commission adopted its *First R&O*, which set forth the Commission's program access rules and procedures to implement these statutory provisions.[7]

4. Section 616 (containing the carriage agreement provisions) is intended to prevent cable systems and other multichannel video programming distributors from taking undue advantage of programming vendors through various practices, including coercing vendors to grant ownership

---

[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992-- Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265 (Oct. 22, 1993), 9 FCC Rcd 2642 (1993) ("Second R&O"); *see also*, 47 C.F.R. §76.1301(c).

[3] While our decision to dismiss this complaint is based on grounds independent from the procedural defects in its form, the Commission nevertheless cautions the parties in the future to follow the specific separate procedures set forth under the Commission's leased access rules (47 C.F.R. § 76.975) and the program access rules (47 C.F.R. §§ 76.1003(c), 76.1302(c)), and avoid combining separate actions as the complainant did here. It is important that complainants follow appropriate filing procedures as articulated in the rules to promote maximum administrative efficiency.

[4] Section 19 of the 1992 Cable Act amended the Communications Act of 1934 by adding Section 628 to the Act, now codified at 47 U.S.C. § 548; Section 12 of the 1992 Cable Act amended the Communications Act of 1934 by adding Section 616, now codified at 47 U.S.C. § 536.

[5] 47 U.S.C. § 548(b).

[6] 47 U.S.C. § 548(c).

[7] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992-- Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265 (April 30, 1993) 8 FCC Rcd 3359 (1993) (*"First R&O"*).

interests or exclusive distribution rights to multichannel distributors in exchange for carriage on their systems. Section 616 also directs the Commission to establish regulations that prevent cable operators or other multichannel video programming distributors ("MVPDs") from entering into carriage agreements that condition carriage of a vendor's programming on particular concessions. Pursuant to that mandate, on September 23, 1993 the Commission adopted general rules in its *Second R&O*, consistent with the statute's specific prohibitions.

5. Section 612 (containing the leased access provisions) is intended to:

> promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems.[8]

Section 612 directs the Commission to establish (1) the maximum reasonable rates that a cable operator may establish; (2) reasonable terms and conditions for such use; and (3) the procedures for the expedited resolution of disputes concerning rates or carriage under Section 612.[9] In its April 1993 Rate Order, the Commission adopted its initial rules implementing Section 612.[10]

6. The complainant in this case, Hutchens, owns and operates a video production company (currently, called "Georgia Video Professionals") which in 1989 created and produced TWC, a local origination 24-hour cable channel.[11] The complainant describes TWC as a computerized tourist information channel supplemented with local news and information.[12] TCI agreed to carry TWC in September 1990 and commenced carriage without the requirement of a lease fee or a written contract.[13] In early 1993, TCI advised Hutchens that due to the passage of the 1992 Cable Act, TWC must be considered a leased access channel warranting a monthly lease fee.[14] Hutchens subsequently was given a proposed rate schedule for the continuation of carriage by TCI and also a draft lease agreement.[15] Hutchens rejected the agreement and provided TCI with a counter-proposal which was rejected by TCI. TCI terminated negotiations and carriage of TWC on September 20, 1993.[16]

7. On March 8, 1994, over four months after termination of carriage of TWC by TCI, Hutchens filed this complaint with the Commission.[17] On April 7, 1994, TCI filed its Answer. On April 28, 1994, Hutchens filed a Reply.

III. SUMMARY OF PLEADINGS

8. In its complaint, Hutchens contends that TCI was not entitled to a leased access fee as a condition for the continued carriage of TWC.[18] Hutchens contends that "[p]ursuant to § 76.970 of the Commission's Rules, the highest fee that TCI Georgia could have asked Hutchens to pay for carriage of The Welcome Channel would be 'the highest implicit net fee . . . based upon contracts in effect in the previous calendar year.'"[19] Hutchens claims that since "the time TCI Georgia commenced carriage of The Welcome Channel until the time such carriage was terminated, TCI Georgia did not charge a fee in the previous calendar year for any of its independent local program originators, such as Hutchens . . . TCI Georgia was not entitled to demand a commercial leased access fee from Hutchens for the continued carriage of The Welcome Channel."[20] In essence, Hutchens claims that because TCI did not have any contracts with any local program originator in 1992, it was not entitled to charge a commercial leased access fee to Hutchens.

9. Although Hutchens acknowledges in its complaint that the Commission's rules require that a leased access complaint must be filed within 60 days of the violation, Hutchens nevertheless contends that this complaint is timely because it also alleges that after termination of carriage, TCI misappropriated the TWC format and duplicated it for its own programming, which Hutchens contends is a continuing unfair practice that violates the program access rules.[21] In particular, Hutchens claims that: "the format copied by TCI Georgia incorporates the identical photo digital advertising initiated by The Welcome Channel..."[22] Citing the Commission's *Rate Order*, Hutchens contends that "although § 76.975(d) instructs Hutchens to file a Complaint within 60 days of TCI Georgia's termination of carriage of The Welcome Channel, a complaint such as this may be filed anytime[sic] based upon current information when a continuing violation is involved, such as the continuing misappropriation of The Welcome Channel format by TCI Georgia."[23]

10. In addition to the alleged duplication of the TWC format, Hutchens further contends that TCI engaged in other unfair practices that violate § 76.1001 of the Commission's program access rules.[24] Hutchens contends that while the parties were negotiating the leased access fee, TCI made threatening and intimidating statements to Hutchens in order to obtain Hutchens' signature on the leased access agreement.[25] Hutchens also contends that after its termination by TCI, Hutchens was informed that Falcon Cable System was approached by TCI and encouraged to terminate carriage of TWC.[26] While the record is silent on this point, it appears that TWC continues to be carried by the Falcon Cable System.

---

[8] 47 U.S.C. § 532(a).
[9] 47 U.S.C. § 532(4)(B).
[10] *Report and Order and Further Notice of Proposed Rule Making* in MM Docket 92-266, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 5631 ("Rate Order").
[11] Complaint at ¶ 3.
[12] *Id.* at ¶ 4.
[13] *Id.* at ¶ 6.
[14] *Id.* at ¶ 8.
[15] *Id.* at ¶ ¶ 9-10.
[16] *Id.* at ¶ 11.
[17] On February 24, 1994, Hutchens provided TCI with advance notice of the filing of this complaint as required under 47 C.F.R. § 76.1003(a).
[18] Complaint at ¶ 22.
[19] *Id.* at ¶ 19.
[20] *Id.* at ¶ 22.
[21] *Id.* at ¶ 18.
[22] *Id.* at ¶ 12.
[23] *Id.* at ¶ 18.
[24] *Id.* at ¶ 15.
[25] *Id.* at ¶ 15.
[26] *Id.* at ¶ 17.

11. In its answer, TCI contends that TWC appropriately was treated as a leased access carrier and that Hutchens is not entitled to free carriage rates.[27] TCI notes that:

> Section 76.970(b) of the Commission's rules provides that the maximum commercial leased access rate that a cable operator may charge is the highest implicit net fee charged any nonaffiliated programmer within the same program category. Section 76.790(c) and (d) set out the manner in which the implicit net fee should be calculated. There are three defined program categories...:
>
> (1) Programming for which a per event or per channel charge is made;
>
> (2) Programming more than fifty percent of the capacity of which is used to sell products directly to customers; and
>
> (3) All other programming.[28]

TCI contends that TWC comes within the third category.[29]

12. TCI further disputes Hutchens' claim that TCI must provide free leased access on the Valdosta system because there were no previous leased access contracts in place.[30] TCI contends that "[i]f the Valdosta system has to provide leased access for free because there was no previous leased access contract in place, then so do most other cable systems, for few cable systems had leased access customers prior to the 1992 Cable Act."[31] TCI states that this conclusion undermines the Commission's rules and the legislative authority under which they were promulgated, and further defies common sense.[32]

13. TCI states that the Hutchens complaint is untimely and deficient and should be dismissed.[33] TCI states that under the rules, Hutchens was required to file its complaint within 60 days of the alleged violation. The termination of TWC occurred on September 20, 1993 and the complaint was filed on March 8, 1994, more than 170 days after TWC was terminated. TCI further states that the delay in the filing of the complaint cannot be justified by Hutchens' allegation of "a continuing violation [or] the continuing misappropriation of The Welcome Channel format."[34] TCI denies any misappropriation of the TWC format and contends that "[t]he LO [local origination] programming used by TCI/GA is in a standard, commonplace format, long in use in TCI/GA's Albany system and indeed in many cable systems throughout Georgia and throughout the country."[35] Finally, TCI contends that even assuming there was misappropriation, which it denies, such conduct is not proscribed under the leased access rules.[36]

14. While denying all of Hutchens' claims of unfair practices, TCI further contends that Hutchens' theory that TCI violated the program access rules under § 76.1001 is misplaced because that section protects multichannel video programming distributors from unfair restrictions on their access to satellite cable and broadcast programming. TCI further states that since Hutchens is not a multichannel video programming distributor and does not distribute such programming, it has not and can not make the requisite *prima facie* showing required under § 76.1001 of the Commission's Rules.[37]

15. In reply, Hutchens challenges TCI's characterization of the facts and reasserts its claims. Hutchens responds to TCI's statement that it has not misappropriated the format of the show by stating that the TCI advertising executive deliberately attempted to learn about TWC's programming and advertisers.[38] Hutchens claims that TCI immediately contacted former TWC advertisers and that the advertisers recognize that "TCI stole Hutchens' format and programming ideas."[39] Hutchens contends that the definition of multichannel video programming distributors contained in 47 C.F.R. § 76.1000 is open-ended and "flexible enough to include local programming originators such as Hutchens."[40] Hutchens further contends that the emerging barriers to competition experienced by it are clearly acts applicable to Section 76.1001, which the Commission has the flexibility to address.[41]

IV. ANALYSIS

16. As an initial matter, the Commission recognizes that the Hutchens' complaint is replete with procedural

---

[27] Answer at 13.
[28] *Id.* at 13-14.
[29] *Id.* at 14.
[30] *Id.* at 14.
[31] *Id.* at 14-15.
[32] *Id.* at 15.
[33] Answer at 11. TCI further contends that the Complaint is not properly verified because Hutchens' supporting affidavit does not "contain a statement that the affiant has read the complaint ... and that ... it is well grounded in fact and is warranted under Commission's regulations," as required by 47 C.F.R. § 76.1003(c)(2). TCI argues that because of this defect the Complaint is frivolous under § 76.1003(q) requiring that Hutchens be sanctioned. *Id.* at 17-18. Hutchens in its Reply contends that the affidavit was properly verified because under 47 C.F.R. § 76.1003(k)(3), Hutchens' signature, the signature of a party, is the certificate that the affidavit is well grounded in fact and warranted under the rules. Reply at ¶ 2. We reject Hutchens' argument. Section 76.1003(k)(3) of the Commission rules allows for a signature of an attorney or a party to serve as verification of the pleadings "[e]xcept when otherwise specifically provided by rule or statute." Thus, the specific verification requirement of 47 C.F.R. § 76.1003(c)(2) must be met by the Complainant. While TCI is correct that the affidavit does not meet the requirements of the rules, we note that TCI's Answer itself is not in the form prescribed by both 47 C.F.R. §§ 76.1003(c)(3) and 76.1302(c)(3), but rather takes the form of a motion to dismiss. Under the Commission's Rules, unlessh) requested by the Commission or its staff, pleadings other than the complaint, answer and reply will not be considered *See First R&O*, 8 FCC Rcd at 3392 n.104, at 3419 n.228, at 3425 n.241. *See also Second R&O*, 9 FCC Rcd at 2655 n.51. Under the Commission's rules, a defendant that fails to file and serve an answer in the manner prescribed by these rules may be deemed in default and an order may be entered against defendant in accordance with the allegations contained in the complaint. 47 C.F.R. §§ 76.1003(d) and 76.1302(d). However, these procedural defects are not dispositive to our decision here.
[34] Answer at 12.
[35] *Id.* at 12.
[36] *Id.* at 12 n.11.
[37] Complaint at ¶ 15-16.
[38] Reply at ¶ 11.
[39] *Id.* at ¶ 12.
[40] *Id.* at ¶ 4.
[41] *Id.* at ¶ 5.

defects.[42] Rather than dismissing the complaint on this basis alone, however, in the interest of administrative efficiency the Commission separately analyzes the leased access and program access components of the complaint in order to expedite resolution of this matter and to provide guidance to future complainants.[43]

A. Leased Access Claims

17. Hutchens has contended that TCI violated §§ 76.970, 76.971 and 76.975 of the Commission's leased access rules both by requiring a leased access fee from Hutchens for continued carriage of TWC and by ultimately terminating carriage. TCI terminated carriage of TWC on September 20, 1993, and Hutchens' complaint was filed with the Commission 170 days later on March 8, 1994. Under the Commission's rules, Hutchens' complaint is untimely and must be dismissed.

18. The Commission's rules governing commercial leased access dispute resolution provide:

> [a]ny person aggrieved by the failure or refusal of a cable operator to make commercial channel capacity available or to charge rates for such capacity in accordance with the provisions of title IV of the Communications Act, or our implementing regulations 76.970 and 76.971, may file a petition for relief with the Commission."[44]

The rules specify that the "*petition must be filed within 60 days of the alleged violation.*[45]

19. We reject Hutchens' argument that the untimely filing of its leased access claim can be cured by including an allegation that TCI engaged in a continuing violation of the Commission's program access rules through TCI's alleged misappropriation of the TWC format. The allegations concerning misappropriation of the TWC format, even if proven to be true, are entirely unrelated to the leased access rules,[46] and thus cannot revive an otherwise untimely leased access claim.

20. Moreover, Hutchens misplaces its reliance on the Commission's *Rate Order*.[47] There is nothing in the Commission's discussion that supports Hutchens' contention that the time period for filing a leased access petition can be extended by alleging non-leased access claims. To the contrary, in its discussion in that Order the Commission specifically noted the importance of the 60-day filing requirement:

> [i]n order to ensure that complaints are timely, thus guarding against determinations based on a stale record, and to forestall development of patterns of abuse, we will require that petitions be filed within 60 days of the alleged violation. This requirement minimizes the possibility of changed circumstances
>
> . . . and thereby making a remedy more difficult to implement. Second, this 60-day period will afford the parties a brief but reasonable period of time to resolve the dispute without governmental involvement.[48]

21. Therefore, the Commission concludes that Hutchens' leased access complaint filed pursuant to 47 C.F.R. §§ 76.970, 76.971 and 76.975 is untimely and must be dismissed.[49]

B. *Program Access Claims*

22. Hutchens has alleged that TCI engaged in various conduct that constitutes unfair trade practices under §76.1001 of the program access rules. In particular, Hutchens contends that TCI's attempt to intimidate and threaten Hutchens to sign a lease agreement, its subsequent termination of carriage and immediate misappropriation of the TWC format, and its attempt to influence Falcon Cable Systems to terminate carriage, all establish a *prima facie* case against TCI under § 76.1001 of the Commission's Rules.[50] The Bureau must reject these claims, however, because Hutchens is not a multichannel video programming distributor and, thus, does not have standing under Section 19 of the 1992 Cable Act.

23. The program access provisions in the 1992 Cable Act were enacted to increase competition and diversity in the multichannel video programming market.[51] Section 19 of the Act is designed to protect competing distributors from anticompetitive behavior by vertically integrated programming vendors and/or incumbent cable operators. Thus, Section 19(b) provides:

> [i]t shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent *any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.*[52]

---

[42] *See* n.33 and n.3, *infra*.

[43] If we were to dismiss the complaint on the basis of procedural defects alone, the complainant only would have to refile appropriately, thus requiring the Commission to review the refiled complaint and address the substantive merits of the same facts and arguments.

[44] 47 C.F.R. § 76.975(d).

[45] *Id.* (emphasis added).

[46] As discussed in sub-part (B) below, Hutchens also has failed to allege a *prima facie* case under either §§ 628 or 616 of the 1992 Cable Act (47 U.S.C. §§ 548, and 536).

[47] Complaint at ¶ 18.

[48] *Rate Order*, 8 FCC Rcd at ¶ 533.

[49] Because this component of the complaint is dismissed as time-barred, the Commission need not address whether TCI's calculated leased access rate was fair. The Commission emphasizes, however, that its ruling here does not preclude any party, including Hutchens, from filing a legitimate and timely challenge of any leased access rate in accordance with the Commission's rules.

[50] Complaint at ¶ 23.

[51] *See* 47 U.S.C. § 548(a).

[52] Section 628(b) of the Communications Act of 1934, *as amended*, 47 U.S.C. § 548(b) (*emphasis added*).

24. The 1992 Cable Act and the Commission's implementing rules[53] clearly contemplate that program access complaints will be filed only by multichannel video programming distributors.[54] The Commission has defined "multichannel video programming distributor" as "an entity engaged in the business of making available for purchase, by subscribers or customers, *multiple channels of video programming*", such as "a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator".[55]

25. Hutchens is a video production company and does not fall within the statutory definition of a multichannel video programming distributor. In addition, Hutchens' programming is neither satellite cable programming nor satellite broadcast programming as defined in the 1992 Cable Act.[56] Hutchens thus lacks standing to bring a complaint under the program access provisions of the 1992 Cable Act.

26. While Hutchens is precluded from filing a complaint under Section 19, Section 12 of the Cable Act does provide an avenue for video programmers to obtain relief from specified practices by cable operators or other multichannel distributors. The Commission's implementing rules prohibit cable operators or other multichannel video programming distributors from engaging in specific practices against video programming vendors. Thus, Section 76.1301 prohibits the following conduct:

> (a) *Financial Interest.* No cable operator or other multichannel video programming distributor shall require a financial interest in any program service as a condition for carriage on one or more of such operator's/provider's systems.
>
> (b) *Exclusive Interest.* No cable operator or other multichannel video programming distributor shall coerce any video programming vendor to provide, or retaliate against such a vendor for failing to provide, exclusive rights against any other multichannel video programming distributor as a condition for carriage on a system.
>
> (c) *Discrimination.* No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.[57]

27. Given the allegations made against TCI, it appears that Hutchens' complaint more appropriately should be characterized as a potential violation of § 76.1301(c) of the Commission's rules.[58] However, even overlooking this procedural defect and analyzing the complaint under Section 76.1301(c), it is clear that Hutchens has failed to make a proper *prima facie* showing of discrimination in carriage. Indeed, Hutchens has failed to allege, much less demonstrate with any evidence, that there was a difference in price, terms or conditions in the leased access agreement proposed by TCI for carriage of TWC as compared to that offered to any other video programmer. Because Hutchens failed to proffer any evidence that TCI engaged in discriminatory conduct when it required a leased access fee, when it subsequently terminated carriage, or other alleged unfair conduct,[59] the "program access" component of Hutchens' complaint also must be dismissed.[60]

28. Finally, we do not find that the complaint filed by Hutchens is frivolous. Hutchens' complaint was not filed "without any effort to ascertain or review the underlying facts."[61] Further, the complaint is not based on "arguments that have been specifically rejected by the Commission in other proceedings," nor does it have "no plausible basis for relief."[62] The complaint raised legitimate leased access and program access issues. Thus, we cannot conclude that Hutchens' complaint is frivolous. Accordingly, TCI's request for sanctions must be denied.

---

[53] Section 19(c) required the Commission to prescribe regulations to specify particular conduct that is prohibited by subsection (b). Thus, § 76.1001 of the Commission's implementing rules provides:

> |n|o cable operator, satellite cable programming vendor in which a cable operator has an attributable interest, or satellite broadcast programming vendor shall engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent *any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.*

Section 628(c) of the Communications Act of 1934, *as amended*, 47 U.S.C. § 548(c); 47 C.F.R. § 76.1001 (*emphasis added*).

[54] § 76.1003(c)(1)(ii) requires that a program access complaint shall contain "|t|he type of multichannel video programming distributor that describes complainant . . ." Moreover, § 76.1001(c)(1)(viii) requires that the complaint contain "|e|vidence that the complainant competes with the defendant cable operator, or with a multichannel video programming distributor that is a customer of the defendant satellite cable programming or satellite broadcast programming vendor." 47 C.F.R. §§ 76.1003(c)(1)(ii), and 76.1001(c)(1)(viii).

[55] Section 602 of the Communications Act of 1934, *as amended*, 47 U.S.C. § 531; 47 C.F.R. § 76.1000(e).

[56] *Id.*

[57] 47 C.F.R. § 76.1301.

[58] The Commission notes that Hutchens' allegations do not involve claims that TCI either required a financial interest in, or exclusive rights to, TWC and, therefore, no claim appears to be raised under §§ 76.1301(a) or (b) of the Commission's Rules.

[59] Hutchens' allegations pertaining to TCI's alleged misappropriation of the TWC programming format, even if proven to be true, do not constitute a violation of the program access rules. The Commission notes that this type of conduct otherwise may be actionable under other statutes or rules, and it makes no determination of that here.

[60] As noted above, this decision is not based on any conclusion as to whether the specific rate offered by TCI was fair or permissible under the leased access requirements of the 1992 Cable Act. Moreover, such a conclusion is irrelevant and unnecessary to determine whether a complainant has made a *prima facie* case of *discrimination*.

[61] *See First R&O, supra*, at 3427.

[62] *Id.*

V. ORDERING CLAUSE

29. Accordingly, IT IS ORDERED, that Hutchens' combined leased access and program access complaint is DISMISSED, and TCI's request for sanctions IS DENIED. This action is taken by the Chief, Cable Services Bureau, pursuant to delegated authority in Section 0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ELECTRIC PLANT BOARD OF THE CITY OF GLASGOW, KENTUCKY

v. CSR-4188-P

TURNER CABLE NETWORK SALES, INC.

Program Access Complaint Pursuant to 47 C.F.R. Section 76.1002 Relating to Provision of Turner Network Television

MEMORANDUM OPINION AND ORDER

Adopted: September 2, 1994; Released: September 6, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. The Commission has before it a program access complaint ("Complaint") filed by the Electric Plant Board of the City of Glasgow, Kentucky ("Glasgow"), a cable operator serving Glasgow, Kentucky.[1] Glasgow alleges that the conduct of Defendant Turner Cable Network Sales, Inc. ("Turner") in refusing to provide to Glasgow the Turner Network Television programming service ("TNT"), violates § 76.1002 of the Commission's rules.[2] Specifically at issue is an existing contract between Turner Network Television, Inc. ("TNT, Inc.") and Scripps Howard Cable Company ("Scripps Howard") to provide TNT in Glasgow, Kentucky. Turner, a vertically integrated satellite cable programming vendor, serves as agent for TNT, Inc. under this contract.[3] Scripps Howard provides the TNT service in Glasgow, Kentucky, through a cable system it owns and operates there, Telescripps Cable Company of Glasgow ("Telescripps").[4] Glasgow asks that the Commission require Turner to make TNT available to Glasgow.[5] Turner answers that the Scripps Howard/Turner contract is "grandfathered" pursuant to the *Cable Television Consumer Protection and Competition Act of 1992* (the "*1992 Cable Act*")[6] and §76.1002(e)(1) of the Commission's implementing rules, because it provides for exclusivity to Scripps Howard in the provision of TNT, and because it was entered into before June 1, 1990.[7] Therefore, Turner claims, the contract is not subject to the Commission's program access regulations. Turner asks that the Commission dismiss Glasgow's complaint with prejudice and award Turner its costs and attorney's fees.[8] Glasgow believes the contract is not "grandfathered."

2. Based on the pleadings submitted, the Bureau has determined that Glasgow's complaint should be dismissed because the contract is "grandfathered" under the *1992 Cable Act*, and thus is not subject to the Commission's program access regulations. The contract was entered into before June 1, 1990, was not renewed or extended after the *1992 Cable Act* was enacted,[9] and is, in fact, exclusive. In addition, the Bureau denies Turner's request for costs and fees. While this determination thus leaves the contract in force, we note that when it expires on October 31, 1994, the program access regulations require Turner to negotiate with Glasgow to provide TNT on non-discriminatory terms and conditions, or to petition the Commission for a finding that exclusivity for TNT is in the public interest.[10]

II. BACKGROUND, AND SUMMARY OF PLEADINGS

3. The *1992 Cable Act* and the Commission's rules prevent a cable operator from entering into any exclusive contract for satellite cable programming with a satellite cable programming vendor in which a cable operator has an attributable interest with respect to areas served by a cable operator, unless the Commission determines that such contract is in the public interest.[11]

4. In addition, 47 C.F.R. § 76.1002(e)(1) provides:

> Nothing in this section shall affect any contract that grants exclusive distribution rights to any person with respect to satellite cable programming and that was entered into [on] or before June 1, 1990[.]

---

[1] Complaint at 1. Glasgow's complaint, served December 30, 1993, was filed January 6, 1994 and placed on public notice January 26, 1994. Turner filed its answer January 31, 1994. Glasgow did not file a reply. Copies of these documents are available to the public in the Commission's Public Reference Center; 1919 M St., NW, Room 242; Washington, D.C. 20554.

[2] Complaint at 3-4. *See* 47 C.F.R. § 76.1002. *See also* § 628 of the Communications Act of 1934, *as amended*, 47 U.S.C. § 548.

[3] Answer to Program Access Complaint ("Answer") at 1-3.

[4] Answer at 2-3.

[5] Complaint at 5.

[6] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[7] §628(h)(1) of the Communications Act of 1934, *as amended*, 47 U.S.C. § 548(h)(1), provides "Nothing in this section shall affect any contract that grants exclusive distribution rights to any person with respect to satellite cable programming and that was entered into on or before June 1, 1990[.]" *See also* 47 C.F.R. §76.1002(e)(1).

[8] Answer at 6.

[9] § 628(h)(2) of the Communications Act of 1934, *as amended*, 47 U.S.C. § 548(h)(2), provides "A contract that was entered into on or before June 1, 1990, but that is renewed or extended after the date of enactment of this section shall not be exempt under paragraph (1)." The *1992 Cable Act* was enacted on October 5, 1992. *See also* 47 C.F.R. § 76.1002(e)(2), providing that "A contract that was entered into on or before June 1, 1990, but that was renewed or extended after October 5, 1992, shall not be exempt under paragraph (e)(1) of this section."

[10] *See* 47 U.S.C. § 548(h)(2); *see also* 47 C.F.R. § 76.1002(e)(2).

[11] *See* 47 U.S.C. § 548(c)(2)(D); *see also* 47 C.F.R. §76.1002(c)(2). 47 C.F.R. § 76.1002(c)(5) provides: "Any . . . satellite cable programming vendor in which a cable operator has an attributable interest . . . seeking to enforce or enter into an exclusive contract in an area served by a cable operator must submit a 'Petition for Exclusivity' to the Commission for approval."

5. On October 3, 1988 Turner, as agent for TNT, Inc. in the performance of contracts for the provision of TNT,[12] entered into a three year contract[13] with Scripps Howard to provide TNT in Glasgow, Kentucky through Telescripps.[14] Georgia law governs the contract.[15]

6. The outcome of this dispute depends on resolution of two issues related to the October 3, 1988 Scripps Howard/Turner contract. The first issue is whether or not the contract was renewed or extended after the *1992 Cable Act* was enacted. The second issue is whether or not this contract actually provides exclusivity to Scripps Howard for the TNT programming. If the contract was renewed or extended after October 5, 1992, or if it is not in fact exclusive, then it cannot be brought within the protection of the statute's "grandfathering" clause.

7. *Renewed or Extended Issue.* While the parties originally entered into the subject contract on October 3, 1988, the contract was amended by the parties on August 27, 1990.[16] By the amendment's terms, the contract term was extended to "expire on October 31, 1994."[17] The amendment, governed by Georgia law, also provided that the contract "shall, except as modified herein, remain in full force and effect."[18]

8. There is no dispute that neither the contract nor the amendment has been determined by the Commission to be in the public interest, and no dispute as to whether Turner has petitioned the Commission for exclusivity--it has not. Turner argues, however, that "its denial of Glasgow's requests for TNT affiliation were proper and lawful in all respects" because "exclusive agreements entered into on or before June 1, 1990 and renewed or extended by October 5, 1992 are grandfathered agreements."[19] Moreover, 47 U.S.C. § 548(h)(2) provides that "[a] contract that was entered into on or before June 1, 1990, but that is renewed or extended after the date of enactment of this section [October 5, 1992] shall not be exempt[.]"[20] Thus, Turner argues that because the August 27, 1990 amendment predates the effective date of the *1992 Cable Act*, the contract (assuming, of course, that it is in fact exclusive) is clearly "grandfathered" under the statute and the Commission's implementing rules.

9. Glasgow claims the contract is not exempt as "grandfathered" and that Turner's exclusionary behavior toward Glasgow, absent a finding by the Commission that exclusivity is in the public interest pursuant to 47 U.S.C. §548(c)(2)(D),[21] gives rise to a program access complaint. Glasgow argues that the August 27, 1990 "amendment" created a new contract as of that date--a date post-dating the June 1, 1990 operative date for exemptions under 47 U.S.C. § 548(h)(1) and 47 C.F.R. § 76.1002(e)(1), and concludes that the "[d]efendant's conduct in refusing to provide TNT programming to Complainant is in violation of 47 C.F.R. § 1002(c)."[22]

10. *Exclusivity Issue.* The October 3, 1988 Scripps Howard/Turner contract gave Scripps Howard "[t]he exclusive license and right during the Term" to provide TNT in Glasgow,

> except that such licenses and rights shall not be exclusive with respect to any area where: (a) a third party was authorized by appropriate governmental authority to operate a cable system and was in fact operating that cable system as of March 9, 1988 . . . or (b) a third party system attained a mandatory cable franchise as of March 9, 1988 which provided that third party with an affirmative obligation to serve a specifically delineated geographical area, . . .[23]

11. The Scripps Howard/Turner contract is thus exclusive unless on the relevant date, March 9, 1988, some third party--Glasgow, for purposes of this *Memorandum Opinion and Order* --was either operating a cable system in Glasgow, Kentucky, or had by that date "attained a mandatory cable franchise . . . which provided [Glasgow] with an affirmative obligation" to so operate. In January 1988 the City of Glasgow, Kentucky ("City") granted Glasgow a franchise to install and operate a cable television system in Glasgow, Kentucky.[24]

12. There is no dispute that on March 9, 1988, Glasgow was not "in fact operating" a cable system. The Complaint acknowledges that "[t]he cable television system of Complainant began service, in June, 1989."[25] The Answer reiterates this admission.[26] The issue of whether TNT had provided exclusivity to Scripps Howard pursuant to the October 3, 1988 contract thus centers on whether, on March 9, 1988, Glasgow had "attained a mandatory cable franchise . . . which provided [it] with an affirmative obligation" to operate. Glasgow acknowledges that its franchise agreement "did not specifically impose such a mandatory obligation to build," arguing that "nonetheless same

---

[12] Answer at 1-3.

[13] Complaint at 4; Exhibit 6 to the Complaint.

[14] Answer at 2-3.

[15] Exhibit 1 to the Declaration of Deborah Lalo submitted in support of Answer, at 12. The Lalo Declaration was submitted with four attached Exhibits. By letter of January 31, 1994, counsel for Turner submitted Exhibits 1, 2 and 3 to the Lalo Declaration separately from the Declaration itself and Exhibit 4, and requested confidentiality and the issuance of a protective order with respect to those three Exhibits. The request for confidential treatment is hereby granted, except that certain specific information from those Exhibits that is critical to the outcome of this dispute and to this *Memorandum Opinion and Order* will be incorporated, referenced or otherwise disclosed herein where necessary, but only to the extent necessary to support this *Memorandum Opinion and Order*. Turner's counsel was informed that public disclosure of such information would be necessary, and Turner has agreed that information related to the specific language used in the exclusivity provision in the Telescripps contract, the expiration date of the contract, and the fact that Georgia law governed the contract, could be disclosed.

[16] Answer at 3; Complaint at 4; Exhibit 7 to the Complaint.

[17] Exhibit 3 to Declaration of Deborah Lalo submitted in support of Answer, at 3; Answer at 5; Complaint at 5; Exhibit 7 to the Complaint.

[18] Exhibit 3 to the Declaration of Deborah Lalo submitted in support of Answer, at 7.

[19] Answer at 5.

[20] *See also* 47 C.F.R. § 76.1002(e)(2).

[21] *See also* 47 C.F.R. § 76.1002.

[22] Complaint at 5.

[23] Answer at 2.

[24] Complaint at 2; Exhibit 1 to the Complaint. The city ordinance, which constitutes the franchise agreement, is attached to this *Memorandum Opinion and Order* as Exhibit 1. Note specifically § 1, § 6 and § 9 of the agreement.

[25] Complaint at 2.

[26] Answer at 5.

was implicit in" the franchise agreement.[27] Turner responds that "the franchise agreement that Glasgow had in place . . . gave Glasgow the *authority* to build a cable system within a given period of time. Glasgow's franchise agreement, however, did not resemble the 'mandatory obligations to build a cable system' [that] the [Scripps Howard/Turner contract] contemplates . . ., which characteristically mandate building out all homes in certain clearly defined areas and impose severe financial sanctions if the operator fails to build or does a poor job of construction."[28]

13. In any event, after receiving a franchise from the City of Glasgow, Glasgow contacted TNT, seeking its programming. In May 1988 Glasgow received what it terms "a contract whereby it could acquire and distribute TNT," claiming it "was offered [this contract] by Defendant."[29] Turner responds that the document Glasgow received in May, 1988 was "a standard exclusive TNT Affiliate Agreement," which Turner says was made available for Glasgow to review to determine whether it could purchase TNT.[30] Turner explains that because it had "no specific knowledge of where cable operators were operating or whether one or more operators were serving cable in the same areas," its customary practice was to appraise operators seeking access to TNT of the standard contract terms governing distribution of TNT.[31] By allowing an operator to examine the exclusivity provision in the standard contract to determine whether such operator was eligible to receive TNT, Turner contends that it "specifically attempted to protect itself contractually against any unintentional conflicting grants of rights."[32] Turner explains that the slightly modified exclusivity provision in the Scripps Howard/Turner contract is merely an annotated version of its general "standard exclusive TNT Affiliate Agreement."[33]

14. The parties agree that Glasgow returned the "contract" or the "standard exclusive TNT Affiliate Agreement" to Turner in March 1989,[34] three months before Glasgow's system began service. Glasgow argues that it "formally tendered to Defendant the contract" and that

> [d]efendant declined to itself sign that contract. Complainant was subsequently advised by Defendant that its refusal to provide TNT service was based upon an allegedly exclusive agreement with Telescripps Cable Company, whereby TNT would not be made available to Complainant. Defendant contended that the franchise of Complainant did not impose a mandatory obligation to build and to have a cable distribution system in place as of March 9, 1988.[35]

Turner responds that it refused to execute the agreement because Telescripps/Scripps Howard was already a TNT affiliate, and that a subsequent grant to Glasgow of TNT carriage would have violated its existing grant of exclusive distribution to Scripps Howard.

15. To summarize thus far: the pleadings indicate that in May 1988, Glasgow received a form contract for distribution of TNT from Turner setting forth the relevant standard "exclusivity" provision. Glasgow believed that this constituted an "offer" from Turner; Turner contends that it had merely provided its standard form contract at Glasgow's request. Glasgow did not immediately respond. Scripps Howard, however, entered into a contract with Turner on October 3, 1988, which contained a slightly modified version of the exclusivity provision. In March 1989, the parties agree that Glasgow returned the Turner contract to Turner, which Glasgow considered to be an acceptance of the offer to purchase distribution rights for TNT from Turner. Turner refused to sign the agreement, however, responding that it had entered into an exclusive obligation to provide TNT to Scripps Howard on October 3, 1988.[36]

16. The parties agree that in March 1991, the City amended Glasgow's original January 1988 Franchise Agreement.[37] The amendment was effective "as of the effective date of the Franchise Ordinance, nunc pro tunc."[38] The amendment to the franchise agreement noted that the City "desires to clarify and ensure the obligation originally undertaken by [Glasgow] and required by [the franchise agreement] to timely complete the construction of said cable television system so as to enable it to provide cable television service to all areas of the City served by [Glasgow]," and further noted that Glasgow "agrees that the understanding and intent of the franchise [agreement] was that [Glasgow] would without delay commence construction of the cable television system and complete it within a reasonable period of time."[39] The amendment to the franchise agreement then added to § 6 of the franchise agreement the following requirement:

> [i]f [Glasgow] has not completed construction of its entire cable television system so that it is able to provide cable television service, upon request, to subscribers in all areas of the City served by [Glasgow] within three (3) years of the effective date of this [Amendment], [Glasgow] shall forfeit to the City $100 per day for each and every day that such construction is not completed.[40]

17. Glasgow argues the amendment to the franchise agreement was imposed by the City as a simple clarification that the original franchise agreement contained an

---

[27] Complaint at 2.
[28] Answer at 5.
[29] Complaint at 2.
[30] Answer at 3.
[31] Answer at 3-4.
[32] *Id.*
[33] Answer at 3.
[34] Complaint at 2; Answer at 4.
[35] Complaint at 2.
[36] Complaint at 2; Answer at 4-5; Exhibit 4 to the Declaration of Deborah Lalo submitted in support of Answer.
[37] Complaint at 2-3; Answer at 5.
[38] The amendment is attached to this *Memorandum Opinion and Order* as Exhibit 2. It is also attached as Exhibit 2 to the Complaint. *See* amendment to the franchise agreement at SECTION 3; Complaint at 3; Answer at 5.
[39] Amendment to the Franchise Agreement at 1.
[40] Amendment to the Franchise Agreement at SECTION 1; Complaint at 2-3; Answer at 5.

implicit mandatory obligation to build.[41] Turner argues it was written in specific response to Turner's rejection of Glasgow's application for TNT carriage, designed to refute, retroactively, Turner's objections. In any event, Turner argues "the amendment did not change [Turner's] obligation to Scripps Howard for TNT exclusivity[.]"[42]

18. The parties agree that, with its amended franchise agreement in hand, Glasgow again sought to purchase TNT in April 1991. Reiterating its previous position, Turner again denied the application,[43] and Glasgow filed its complaint.

III. ANALYSIS

19. *Renewed or Extended Issue.* For Glasgow's complaint to have merit and for us to grant the relief sought, we must find that, under Georgia law, the August 27, 1990 amendment establishes a new contract separate and distinct from the January 3, 1988 contract, such that the effect of entering the 1990 contract was rescission of the 1988 contract. The law does not support such a determination.

20. General contract principles establish that in order for the August 1990 amendment to be considered a separate and distinct contract, rather than merely a renewal, extension or modification of the original January 1988 contract, the amendment must have substantially changed the rights and duties under the original contract. The surrender of rights under the original contract is the consideration for the mutual agreement of rescission. Complete rescission is necessary, for any change "which would discharge less than all the parties' remaining duties of performance is best treated as a modification."[44] Relevant case law states:

> To have the effect of complete rescission, the new contract must either explicitly rescind the earlier contract, or deal with the subject matter of the former contract so comprehensively as to be complete within itself . . ., or it must present such inconsistencies with the first contract that the two cannot . . . stand together.[45]

21. Thus, under general contract principals we believe that the August 1990 amendment must be viewed as a modification and extension; the changes it made to the original contract fall far short of those needed to qualify the amendment as a separate and distinct contract, amounting to rescission of the original contract. The changes affect only specific details of program provision, advertising requirements, and rates and fees and their structure.[46] But the amendment leaves the general purpose of the original contract in place, presents no material inconsistencies with the original contract, and cannot be viewed as complete within itself. Moreover, it expressly states that the original contract continues "in full force and effect."[47] Further, in Georgia "[t]he law is clear that rescission requires the mutual assent of the parties, expressly, impliedly or by conduct.[48] Nothing in the record suggests any party to the TNT, Inc./Scripps Howard contract ever intended to rescind the contract, or ever acted in such a way as to manifest such intent.

22. Therefore, we find that the law and the facts are clear: the August 1990 amendment merely extended the contract's term to October 31, 1994. The contract, dating from October 1988 and thus entered into prior to June 1, 1990, and extended before October 5, 1992, remains in force and, again assuming it is in fact exclusive, is "grandfathered" pursuant to § 628(h) of the *1992 Cable Act*.

23. *Exclusivity Issue.* While we believe that the question of whether the Turner/Scripps Howard contract actually confers exclusive distribution rights is difficult, we must nonetheless conclude that the contract is exclusive. It is clear Glasgow was not operating a cable system on March 9, 1988. Whether it had an affirmative obligation to do so because it had a mandatory franchise is a more complicated matter. The arguments of both parties on this point are reasoned and have merit. Under the circumstances, we find determinative the facts that: (1) neither the term "obligation" nor the term "mandatory" is found in any of the relevant sections of the original franchise agreement; (2) Glasgow admits that the original franchise agreement "did not specifically impose such a mandatory obligation to build";[49] and (3) the original franchise agreement contains no penalties for not building. Therefore, we cannot conclude that the original franchise agreement constituted a "mandatory cable franchise . . . which provided [Glasgow] with an affirmative obligation to serve" the City.[50] Accordingly, we find that the Turner/Scripps Howard contract does, in fact, provide Scripps Howard with exclusive distribution rights for TNT.

24. We emphasize, however, that when the current contract expires on October 31, 1994, the program access regulations require Turner to negotiate with Glasgow, offering distribution rights on non-discriminatory terms and conditions, or to petition the Commission for exclusivity in an attempt to establish that it is in the public interest for it to withhold TNT from Glasgow. Moreover, we note that

---

[41] Complaint at 2-3.

[42] Answer at 5.

[43] Complaint at 3; Exhibit 3 to the Complaint; Answer at 5.

[44] E. Allan Farnsworth, *Contracts* § 4.24 n.18 (1982).

[45] *Silver Syndicate v. Sunshine Mining Co.*, 101 Idaho 226, 611 P.2d 1011 (1979). *See also Travelers Ins. Co. v. Workmen's Compensation Appeals Bd.*, 434 P.2d 992, 998 (1967), stating "[a]nh),alteration of details of the contract which leaves undisturbed its general purpose constitutes a modification rather than a rescission of the contract."

[46] Exhibits 1 and 3 to the Declaration of Deborah Lalo submitted in support of Answer.

[47] Exhibit 3 to the Declaration of Deborah Lalo submitted in support of Answer, at 7.

[48] *Cornell Industries, Inc. v. Colonial Bank*, 162 Ga. App. 822, 823, 293 S.E. 2d 370, 371 (1982) (oral agreement to negotiate a possible modification of original contract did not constitute a rescission or termination of that contract). *See also Owens v. Union City Chrysler-Plymouth, Inc.*, 210 Ga. App. 378, 436 S.E. 2d 94 (1993) (holding no rescission of contract; where contract contains a merger clause, party's announced purpose to rescind, to which his subsequent actions must then adhere, is necessary for rescission).

[49] Complaint at 2.

[50] Exhibit 1 to the Declaration of Deborah Lalo submitted in support of Answer, at 3.

§628 of the *1992 Cable Act* provides that a contract "renewed or extended after October 5, 1992, shall not be exempt" from the program access regulations.[51]

25. *Request For Attorney's Fees.* Turner has requested that it be awarded costs and attorney's fees. In the Commission's order implementing the program access requirements of § 628,[52] the Commission determined that, with respect to remedies for violations of the exclusivity prohibitions, the *1992 Cable Act* provides the Commission with the authority to order a programming vendor violating its rules to provide the subject programming to the complainant on non-discriminatory terms and conditions. In addition, the Commission may impose sanctions that are available under Title V of the Communications Act of 1934, *as amended*.[53] The Commission concluded, however, that the statute did *not* grant the Commission the authority to assess damages for violations of the program access provisions, because it contains no express provision for damages.[54]

26. Similarly, we note that the *1992 Cable Act* does not expressly grant the Commission the authority to assess damages, costs or attorney's fees for violations of the provision prohibiting the filing of frivolous complaints.[55] The United States Court of Appeals for the District of Columbia has determined that, absent an express grant of authority, the Commission does not have the authority under its general statutory authority contained in § 4(i) of the Communications Act of 1934, *as amended*, to award attorney's fees.[56] Therefore, we conclude that the Commission does not have authority under the *1992 Cable Act* to award costs and attorney's fees for violations of its rules prohibiting the filing of frivolous program access complaints.[57]

27. In any event, we do not find that the complaint filed by Glasgow is frivolous. Glasgow's complaint was not filed "without any effort to ascertain or review the underlying facts."[58] Further, the complaint is not based on "arguments that have been specifically rejected by the Commission in other proceedings," nor does it have "no plausible basis for relief."[59] The complaint raised legitimate questions as to whether the Turner/Scripps Howard contract was "grandfathered" under the statute. Thus, we cannot conclude that Glasgow's complaint is frivolous. Accordingly, Turner's request for costs and attorney's fees must be denied.

IV. ORDERING CLAUSE

28. Accordingly, IT IS ORDERED, that Glasgow's program access complaint IS DISMISSED. Such dismissal is WITHOUT PREJUDICE to Glasgow's ability to renew its complaint after October 31, 1994. Turner's request for costs and attorney's fees IS DENIED. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by § 0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

---

[51] *See* 47 U.S.C. § 548(h)(2); *see also* 47 C.F.R. § 76.1002(e)(2).
[52] *See First Report and Order* in *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket 92-265, 8 FCC Rcd 3359 (1993) (*"First Report and Order"*).
[53] *See First Report and Order*, 8 FCC Rcd at 3392.
[54] *Id.* We note that the National Rural Telecommunications Cooperative has filed a petition for reconsideration of this determination in MM Docket 92-265.
[55] *See* 47 U.S.C. § 548(f)(3).
[56] *See Turner v. FCC*, 514 F. 2d 1354 (D.C. Cir. 1975).
[57] *See* 47 C.F.R. § 76.1003(q).
[58] *See First Report and Order, supra*, at 3427.
[59] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Co. — File No. I-T-C-94-300

Application for Authorization, Pursuant to Section 214 of the Communications Act, As Amended, and the TAT-10 Section 214 to Modify its Ownership of Capacity in the TAT-10 Cable System

ORDER AND AUTHORIZATION

Adopted: August 22, 1994; Released: September 13, 1994

By the Chief, International Facilities Division:

1. American Telephone and Telegraph Co. (AT&T) filed the above-captioned application, pursuant to Section 214 of the Communications Act of 1934, as amended, and the TAT-10 Section 214 Authorization,[1] to modify its ownership capacity in the TAT- 10 Cable System.[2] We placed the application on public notice on May 11, 1994, and received no comments.

2. Specifically, AT&T seeks approval to modify its ownership capacity in the TAT-10 Cable System as reflected in the First Supplementary Agreement to the TAT-10 Construction and Maintenance Agreement, filed as Attachment A to the application, in order to accommodate the revised requirements of the TAT-10 Cable System owners. In the original TAT-10 authorization, AT&T was authorized to own and operate 287 jointly-owned and 17 wholly-owned MIUs.[3] AT&T now seeks authority to own and operate 307 jointly-owned MIUs and 15 wholly-owned MIUs.[4] We find that the present and future public convenience and necessity require grant of this application.

3. Accordingly, IT IS ORDERED that Application File No. I-T-C-94-300 IS GRANTED and AT&T is authorized to modify its ownership of capacity and acquire the additional number of circuits in the TAT-10 Cable System, as described in paragraph 2, *supra*.

4. This Order is issued pursuant to Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the public notice of this Order. (*See* Section 1.4(b)(2) of the Commission's rules, 47 C.F.R. §1.4(b)(2).)

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

---

[1] *AT&T*, 7 FCC Rcd 135 (1992).

[2] The TAT-10 Cable System extends between landing points at cable stations at Green Hill, Rhode Island; Norden, Germany; and Alkmaar, the Netherlands.

[3] A MIU is a unit designated as the minimum unit of investment in the TAT-10 Cable System, allowing the use of 2.048 Mbit/s and the additional 162,539.68 bits per second required for multiplexing in each direction. Of the 287 jointly-owned MIUs, 196 were between the U.S. and Germany, 23 between the U.S. and the Netherlands, and 68 between the Netherlands and Germany. All of the wholly-owned MIUs were between the U.S. and Germany.

[4] AT&T proposes to increase by 20 its jointly-owned MIUs between Germany and the Netherlands. AT&T also proposes to decrease its number of wholly-owned MIUs in the following manner: 13 wholly-owned MIUs between the U.S. and Germany and 2 wholly-owned MIUs between the U.S. and the Netherlands.

SCHEDULE D-1
18-Nov-92

TAT-10 CABLE SYSTEM
MIUS ASSIGNED FOR USE BY THE PARTIES TO THIS AGREEMENT
BETWEEN GREEN HILL AND NORDEN (NOTE 1)

GREEN HILL ACCESS PARTIES

NORDEN ACCESS PARTIES	AT&T	BT	DACOM	DBP-T	HTC	HKTI	IDB	IDC	ITDC	ITJ	KDD	KT	MCII	OTC	PLDT	SINGTEL	SPRINT	SPTT	TLMX	TLGB	TNZI	TRT/FTC	WCOM	TOTAL
APTT	2	0	0	0	0	0	0	0	0	0	1	0	0	1	0	0	0	0	0	1	0	0	0	5
AT&T	13	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	13
BELGACOM	2	0	0	0	0	0	0	1	0	1	1	0	4	0	0	0	0	0	0	0	0	0	0	9
BT	42	22	1	0	1	2	0	1	0	2	3	0	42	0	0	2	8	0	1	0	0	3	0	126
DBP-T	66	0	1	45	0	1	2	5	2	4	8	1	21	3	2	3	13	0	1	4	1	3	1	165
IDC	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
KDD	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	1
MCII	0	0	0	0	0	0	0	0	0	0	0	0	4	0	0	0	0	0	0	0	0	0	0	4
MCL	21	0	0	0	0	0	0	0	0	0	0	0	2	0	0	0	2	0	0	0	0	2	0	27
NPTT	21	0	0	0	0	1	1	1	1	1	0	0	6	1	0	1	4	0	0	3	1	1	0	43
NT	3	0	0	0	0	0	0	1	0	0	0	0	1	0	0	0	1	0	0	0	0	0	0	6
SFPT	2	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	1	0	0	1	0	0	0	5
SPRINT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	2
SPTT	13	0	0	0	0	0	0	0	0	1	2	0	2	1	0	1	1	2	0	0	0	1	0	24
ST	6	0	6	0	0	0	0	0	0	0	1	0	2	0	0	0	2	0	0	1	0	0	0	12
TD	2	0	0	0	0	0	0	0	0	1	0	0	3	1	0	0	1	0	0	2	0	0	0	10
TLGB	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4	0	0	0	4
TPSA	15	0	0	0	0	0	0	0	0	0	0	0	3	0	0	0	2	0	0	3	0	0	0	23
TPTT	1	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	2
TOTAL	209	22	2	45	1	4	3	10	3	10	15	1	92	7	2	7	35	2	2	19	2	10	1	504

SCHEDULE D-2
18-Nov-92

TAT-10 CABLE SYSTEM
MIUs ASSIGNED FOR USE BY THE PARTIES TO THIS AGREEMENT
BETWEEN GREEN HILL AND ALKMAAR (NOTE 2)

GREEN HILL ACCESS PARTIES

ALKMAAR ACCESS PARTIES	AT&T	HKTI	IDB	IDC	ITDC	ITJ	KDD	MCII	OTC	SINGTEL	SPRINT	TLGB	TNZI	TRT/FTC	TOTAL
BELGACOM	2	0	0	1	0	1	1	4	0	0	0	0	0	0	9
MCII	0	0	0	0	0	0	0	2	0	0	0	0	0	0	2
NPTT	21	1	1	1	1	1	0	6	1	1	4	3	1	1	43
TOTAL	23	1	1	2	1	2	1	12	1	1	4	3	1	1	54

SCHEDULE D-1
18-Nov-92

TAT-10 CABLE SYSTEM
MIUS ASSIGNED FOR USE BY THE PARTIES TO THIS AGREEMENT
BETWEEN GREEN HILL AND NORDEN (NOTE 1)

GREEN HILL ACCESS PARTIES

NORDEN ACCESS PARTIES	AT&T	BT	DACOM	DBP-T	HTC	HKTI	IDB	IDC	ITDC	ITJ	KDD	KT	MCII	OTC	PLDT	SINGTEL	SPRINT	SPTT	TLMX	TLGB	TNZ	TRT/FTC	WCOM	TOTAL
APTT	2	0	0	0	0	0	0	0	0	0	1	0	0	1	0	0	0	0	0	1	0	0	0	5
AT&T	13	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	13
BELGACOM	2	0	0	0	0	0	0	1	0	1	1	0	4	0	0	0	0	0	0	0	0	0	0	9
BT	42	22	1	0	1	2	0	1	0	2	3	0	42	0	0	2	6	0	1	0	0	3	0	126
DBP-T	66	0	1	45	0	1	2	5	2	4	6	1	21	3	2	3	13	0	1	4	1	3	1	186
IDC	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
KDD	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	1
MCII	0	0	0	0	0	0	0	0	0	0	0	0	4	0	0	0	0	0	0	0	0	0	0	4
MCL	21	0	0	0	0	0	0	0	0	0	0	0	2	0	0	0	2	0	0	0	0	2	0	27
NPTT	21	0	0	0	0	1	1	1	1	1	0	0	6	1	0	1	4	0	0	3	1	1	0	43
NT	3	0	0	0	0	0	0	1	0	0	0	0	1	0	0	0	1	0	0	1	0	0	0	6
SFPT	2	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	1	0	0	0	0	0	0	2
SPRINT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	2
SPTT	13	0	0	0	0	0	0	0	0	1	2	0	2	1	0	1	1	2	0	0	0	1	0	24
ST	6	0	0	0	0	0	0	0	0	0	1	0	2	0	0	0	2	0	0	1	0	0	0	12
TD	2	0	0	0	0	0	0	0	0	1	0	0	3	1	0	0	1	0	0	2	0	0	0	10
TLGB	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	4	0	0	0	4
TPSA	15	0	0	0	0	0	0	0	0	0	0	0	3	0	0	0	2	0	0	3	0	0	0	23
TPTT	1	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	2
TOTAL	209	22	2	45	1	4	3	10	3	10	15	1	92	7	2	7	36	2	2	19	2	10	1	504

SCHEDULE D-2
18-Nov-92

TAT-10 CABLE SYSTEM
MIUs ASSIGNED FOR USE BY THE PARTIES TO THIS AGREEMENT
BETWEEN GREEN HILL AND ALKMAAR (NOTE 2)

GREEN HILL ACCESS PARTIES

ALKMAAR ACCESS PARTIES	AT&T	HKTI	IDB	IDC	ITDC	ITJ	KDD	MCII	OTC	SINGTEL	SPRINT	TLGB	TNZI	TRT/FTC	TOTAL
BELGACOM	2	0	0	1	0	1	1	4	0	0	0	0	0	0	9
MCII	0	0	0	0	0	0	0	2	0	0	0	0	0	0	2
NPTT	21	1	1	1	1	1	0	6	1	1	4	3	1	1	43
TOTAL	23	1	1	2	1	2	1	12	1	1	4	3	1	1	54

SCHEDULE D-3
18-Nov-92

TAT-10 CABLE SYSTEM
MIUS ASSIGNED FOR USE BY THE PARTIES TO THIS AGREEMENT
BETWEEN NORDEN AND ALKMAAR (NOTE 3)

NORDEN ACCESS PARTIES

ALKMAAR ACCESS PARTIES	AT&T	DBP-T	HKTI	IDB	IDC	ITDC	ITJ	KDD	MCII	NT	OTC	SFPT	SINGTEL	SPRINT	ST	TD	TLGB	TNZI	TPSA	TRT/FTC	TOTAL
AT&T	2	60	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	5	0	67
BELGACOM	2	0	0	0	1	0	1	1	4	4	0	1	0	0	12	17	0	0	2	0	45
BTE	0	27	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	27
HTC	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
IDC	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2
ITDC	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2
ITJ	0	4	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4
KDD	0	9	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	9
KT	0	4	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4
MCII	0	46	0	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	48
MCL	0	64	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	64
NPTT	21	25	1	1	1	1	1	0	6	13	1	9	1	4	43	12	3	1	6	1	151
OTC	0	4	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4
PLDT	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2
SPRINT	0	6	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	6
TLMX	0	9	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	9
TLFN	0	188	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4	0	192
TOTAL	25	453	1	1	2	1	2	1	12	17	1	10	1	4	55	29	3	1	17	1	637

Notes to Schedules - D1, D2 & D3

NOTES:

1. Schedule D-1 is comprised of all MIU assignments in Segment B between Green Hill and Norden including those connected via Segment C to corresponding MIU assignments in Segment D.

2. Schedule D-2 is comprised solely of those MIU assignments in Segment B which are connected, via Segment C, to corresponding MIU assignments in Segment D.

3. Schedule D-3 is comprised of all MIU assignments in Segment D between Norden and Alkmaar including those connected via Segment C to corresponding MIU assignments in Segment B.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Co. — File No. I-T-C-94-301

Application for Authorization, Pursuant to Section 214 of the Communications Act, As Amended, to Modify its Ownership of Capacity in the TAT-12/TAT-13 Cable Network

ORDER AND AUTHORIZATION

Adopted: August 22, 1994; Released: September 13, 1994

By the Chief, International Facilities Division:

1. American Telephone and Telegraph Co. (AT&T) filed the above-captioned application, pursuant to Section 214 of the Communications Act of 1934, as amended, and the TAT 12/TAT-13 Section 214 Authorization,[1] to modify its ownership capacity in the TAT-12/TAT-13 Cable Network.[2] We placed the application on public notice on May 11, 1994, and received no comments.

2. Specifically, AT&T seeks approval to modify its ownership capacity in the TAT-12/TAT-13 Cable Network as reflected in the First Supplementary Agreement to the TAT-12/TAT-13 Construction and Maintenance Agreement, filed as Attachment A to the application, in order to accommodate the revised requirements of the TAT-12/TAT-13 Cable Network owners. In the original TAT-12/TAT-13 authorization, AT&T was authorized to own and operate 757 jointly-owned and 199 wholly-owned MIUs,[3] for a total of 1155 MIU half-interests. AT&T now seeks authority to own and operate 697 jointly-owned and 193 wholly-owned MIUs, for a total of 1083 MIU half-interests.[4] We find that the present and future public convenience and necessity require grant of this application.

3. Accordingly, IT IS ORDERED that Application File No. I-T-C-94-301 IS GRANTED and AT&T is authorized to modify its ownership of capacity and acquire the additional number of circuits in the TAT-12/TAT-13 Cable Network, as described in paragraph 2, *supra*.

4. This Order is issued pursuant to Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the public notice of this Order. (*See* Section 1.4(b)(2) of the Commission's rules, 47 C.F.R. §1.4(b)(2).)

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] *AT&T*, 8 FCC Rcd 4810 (1993).

[2] The TAT-12/TAT-13 Cable Network extends between landing points at cable stations at Green Hill, Rhode Island; Lands End, United Kingdom; Penmarch, France; and Mastic Beach, New York.

[3] A MIU is a unit designated as the minimum unit of investment in the TAT-12/TAT-13 Cable System, allowing the use of 2.048 Mbit/s (30 MAUOs) and the additional 162,539.68 bits per second required for multiplexing in each direction. A MAUO is a 64 kilobit per second circuit equivalent.

[4] *See* AT&T Application at 3.

SCHEDULE C-5
20-Sep-93

TAT12/TAT13 CABLE SYSTEM
MIUS ASSIGNED FOR JOINT USE BY THE PARTIES TO THIS AGREEMENT
U.S. - EUROPE

EASTERN ACCESS PARTIES	WESTERN ACCESS PARTIES																								
	AT&T	BT	DACOM	DBP-T	DGT	FT	HKTI	HTC	IDB	IDC	ITDC	ITJ	KDD	KT	MCI	OPTUS	PLDT	SINGTEL	SPRINT	TELMEX	TELSTRA	TLGB	TRT/FTC	WCOM	TOTAL
APTT	7	0	0	0	0	0	0	0	0	0	0	0	1	1	3	0	0	0	1	0	0	0	0	0	13
AT&T	193	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	193
BELGACOM	21	0	0	0	0	0	0	0	0	2	1	1	5	1	21	0	1	0	4	0	0	0	0	1	58
BT	210	199	0	0	1	0	3	0	2	3	1	3	25	1	126	3	0	0	11	1	7	0	0	0	596
BTE	33	0	0	0	0	0	0	0	0	0	0	0	0	0	16	0	0	0	2	0	1	0	0	0	52
CYTA	2	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	0	0	1	0	0	1	0	0	6
DBP-T	130	0	0	1	2	0	1	1	0	15	2	4	16	4	92	1	2	0	16	0	4	0	0	2	295
FT	64	0	2	0	0	19	1	0	1	3	2	3	16	2	42	1	1	1	7	2	2	0	0	0	169
HT	4	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4
ITC	8	0	0	0	0	0	1	0	0	0	0	0	2	0	4	0	1	0	1	0	0	0	0	0	17
LPT	2	0	0	0	0	0	0	0	0	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	4
MARCONI	2	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	3
MCI	0	0	0	0	0	0	0	0	0	0	0	0	0	0	32	0	0	0	0	0	0	0	0	0	32
MCL	38	0	1	0	0	0	1	0	2	3	1	1	11	2	48	0	1	1	11	0	2	0	0	2	126
NPTT	27	0	0	0	0	0	1	0	0	1	0	1	2	0	12	0	0	1	4	0	0	0	0	0	49
NT	8	0	0	0	0	0	0	0	0	1	0	0	0	0	3	0	0	0	2	0	0	0	0	0	12
OTE	5	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	0	0	1	0	0	0	0	0	8
SFPT	5	0	0	0	0	0	0	0	0	0	0	0	1	0	1	0	0	0	1	0	0	0	0	0	8
SLT	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	1	0	0	1	0	0	4
SPRINT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	10	0	0	0	0	0	10
SPT-PHA	4	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	1	0	0	0	0	0	6
STSE	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1
SWISST	28	0	0	0	0	0	1	0	0	2	0	1	4	0	16	0	0	0	2	1	1	0	0	2	58
TD	3	0	0	0	0	0	0	0	0	0	0	1	1	0	2	0	0	0	2	0	0	0	0	0	9
TELE2	4	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4
TELIA	28	0	0	0	0	0	0	0	0	0	0	0	1	0	10	0	0	0	1	0	0	0	1	1	42
TLFN	21	0	0	0	0	0	0	0	0	0	1	0	3	0	8	0	1	0	2	0	0	0	0	0	36
TPSA	15	0	0	0	0	0	0	0	0	0	0	0	0	0	3	0	0	0	1	0	0	0	0	0	19
TPTT	2	0	0	0	0	0	0	0	0	0	0	0	0	0	4	0	0	0	1	0	0	0	0	0	7
VSNL	8	0	0	0	0	0	0	0	0	0	0	0	0	0	3	0	0	0	4	0	0	0	0	0	17
WCOM	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
TOTALS	990	199	3	1	3	19	9	1	5	30	8	15	91	11	455	5	7	3	87	4	17	4	1	14	1882

SCHEDULE C-1
20-Sep-93

TAT-12/TAT-13 CABLE NETWORK
MIUS ASSIGNED BETWEEN THE SYSTEM INTERFACES LOCATED AT

MASTIC BEACH AND PENMARCH

EASTERN ACCESS PARTIES	WESTERN ACCESS PARTIES																
	AT&T	DACOM	FT	HKTI	IDC	ITDC	ITJ	KDD	KT	MCII	OPTUS	PLDT	TELMEX	TELSTRA	TLGB	WCOM	TOTAL
APTT	4	0	0	0	0	0	0	1	1	1	0	0	0	0	0	0	7
AT&T	31	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	31
BELGACOM	0	0	0	0	1	0	0	1	0	0	0	0	0	0	0	0	2
CYTA	1	0	0	0	0	0	0	0	0	1	0	0	0	0	1	0	3
DBP-T	30	0	0	1	0	0	0	5	0	23	0	0	0	0	0	0	59
FT	42	2	3	1	1	1	1	8	2	21	1	1	1	1	0	0	86
HT	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2
ITC	4	0	0	1	0	0	0	1	0	2	0	1	0	0	0	0	9
MARCONI	1	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	2
MCII	0	0	0	0	0	0	0	0	0	13	0	0	0	0	0	0	13
OTE	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2
SLT	1	0	0	0	0	0	0	0	0	1	0	0	0	0	1	0	3
SWISST	13	0	0	1	2	0	1	2	0	8	0	0	1	1	0	1	30
TPTT	1	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	3
VSNL	0	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	2
WCOM	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1
TOTALS	132	2	3	4	4	1	2	18	3	75	1	2	2	2	2	2	255

SCHEDULE C-2
20-Sep-93

TAT-12/TAT-13 CABLE NETWORK
MIUS ASSIGNED BETWEEN THE SYSTEM INTERFACES LOCATED AT

GREEN HILL AND PENMARCH

EASTERN ACCESS PARTIES	WESTERN ACCESS PARTIES														
	AT&T	FT	IDB	IDC	ITDC	ITJ	KDD	MCII	SINGTEL	SPRINT	TELMEX	TELSTRA	TLGB	WCOM	TOTAL
AT&T	11	0	0	0	0	0	0	0	0	0	0	0	0	0	11
BELGACOM	0	0	0	0	0	0	1	0	0	2	0	0	0	0	3
CYTA	1	0	0	0	0	0	0	1	0	1	0	0	0	0	3
DBP-T	30	0	0	2	0	0	4	23	0	0	0	0	0	0	59
FT	42	16	1	2	1	2	8	21	1	7	1	1	0	0	103
ITC	4	0	0	0	0	0	1	2	0	1	0	0	0	0	8
LPT	0	0	0	0	0	0	0	1	0	0	0	0	0	0	1
MARCONI	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1
MCII	0	0	0	0	0	0	0	17	0	0	0	0	0	0	17
OTE	3	0	0	0	0	0	0	2	0	1	0	0	0	0	6
SLT	0	0	0	0	0	0	0	0	0	1	0	0	0	0	1
SPRINT	0	0	0	0	0	0	0	0	0	7	0	0	0	0	7
STSE	1	0	0	0	0	0	0	0	0	0	0	0	0	0	1
SWISST	13	0	0	0	0	0	2	8	0	2	0	0	0	1	26
TPTT	1	0	0	0	0	0	0	2	0	1	0	0	0	0	4
VSNL	6	0	0	0	0	0	0	1	0	4	0	0	2	0	13
WCOM	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1
TOTALS	113	16	1	4	1	2	16	78	1	27	1	1	2	2	265

SCHEDULE C-3
20-Sep-93

TAT-12/TAT-13 CABLE NETWORK
MIUS ASSIGNED BETWEEN THE SYSTEM INTERFACES LOCATED AT

MASTIC BEACH AND LANDS END

EASTERN ACCESS PARTIES	WESTERN ACCESS PARTIES													
	AT&T	HKTI	IDB	IDC	ITJ	KDD	KT	MCII	PLDT	SINGTEL	TELSTRA	TRT/FTC	WCOM	TOTAL
AT&T	13	0	0	0	0	0	0	0	0	0	0	0	0	13
BELGACOM	10	0	0	0	0	1	1	10	0	0	0	0	0	22
BT	105	3	0	0	1	12	0	63	0	0	3	0	0	187
BTE	16	0	0	0	0	0	0	8	0	0	0	0	0	24
DBP-T	35	0	0	0	0	4	0	23	1	0	2	0	1	66
LPT	1	0	0	0	0	0	0	0	0	0	0	0	0	1
MCII	0	0	0	0	0	0	0	1	0	0	0	0	0	1
MCL	19	1	1	3	1	6	1	25	0	0	1	0	1	59
NPTT	13	1	0	0	0	1	0	6	0	1	0	0	0	22
NT	3	0	0	0	0	0	0	3	0	0	0	0	0	6
SFPT	2	0	0	0	0	0	0	0	0	0	0	0	0	2
SPT-PHA	2	0	0	0	0	0	0	0	0	0	0	0	0	2
TD	1	0	0	0	0	0	0	0	0	0	0	0	0	1
TELE2	2	0	0	0	0	0	0	0	0	0	0	0	0	2
TELIA	14	0	0	0	0	0	0	5	0	0	0	1	0	20
TLFN	11	0	0	0	0	0	0	4	0	0	0	0	0	15
TPSA	7	0	0	0	0	0	0	0	0	0	0	0	0	7
VSNL	2	0	0	0	0	0	0	0	0	0	0	0	0	2
WCOM	0	0	0	0	0	0	0	0	0	0	0	0	2	2
TOTAL	256	5	1	3	2	24	2	148	1	1	6	1	4	454

SCHEDULE C-4
20-Sep-93

TAT-12/TAT-13 CABLE NETWORK
MIUS ASSIGNED BETWEEN THE SYSTEM INTERFACES LOCATED AT

GREEN HILL AND LANDS END

EASTERN ACCESS PARTIES	WESTERN ACCESS PARTIES																					
	AT&T	BT	DACOM	DGT	DBP-T	HTC	IDB	IDC	ITDC	ITJ	KDD	KT	MCII	OPTUS	PLDT	SINGTEL	SPRINT	TELMEX	TELSTRA	WCOM		TOTAL
APTT	3	0	0	0	0	0	0	0	0	0	0	0	2	0	0	0	1	0	0	0		6
AT&T	136	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0		136
BELGACOM	11	0	0	0	0	0	0	1	1	1	2	0	11	0	1	0	2	0	0	1		31
BT	105	199	0	1	0	0	2	3	1	2	13	1	63	3	0	0	11	1	4	0		409
BTE	17	0	0	0	0	0	0	0	0	0	0	0	8	0	0	0	2	0	1	0		28
DBP-T	35	0	0	2	1	1	0	13	2	4	5	4	23	1	1	0	16	0	2	1		111
HT	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0		2
LPT	1	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0		2
MCII	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0		1
MCL	19	0	1	0	0	0	1	0	1	0	5	1	24	0	1	1	11	0	1	1		67
NPTT	14	0	0	0	0	0	0	1	0	1	1	0	6	0	0	0	4	0	0	1	0	27
NT	3	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	2	0	0	0	0	6
SFPT	3	0	0	0	0	0	0	0	0	0	1	0	1	0	0	0	1	0	0	0	0	6
SPRINT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3	0	0	0	0	3
SPT-PHA	2	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	1	0	0	0	0	4
TD	2	0	0	0	0	0	0	0	0	1	1	0	2	0	0	0	2	0	0	0	0	8
TELE2	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2
TELIA	14	0	0	0	0	0	0	0	0	0	1	0	5	0	0	0	1	0	0	1	0	22
TLFN	10	0	0	0	0	0	0	0	1	0	3	0	4	0	1	0	2	0	0	0	0	21
TPSA	8	0	0	0	0	0	0	0	0	0	0	0	3	0	0	0	1	0	0	0	0	12
WCOM	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2		2
TOTALS	389	199	1	3	1	1	3	19	6	9	33	6	154	4	4	1	60	1	8	6		908

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
September 7, 1994

Released: September 14, 1994

IN REPLY REFER TO:
92030797
C4-370BS

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

WCKS Broadcasters, Ltd.
Licensee of Station WWST(FM), Karns, TN
9047 Executive Park Drive, Suite 212
Knoxville, Tennessee 37923

Dear Licensee:

This letter constitutes a Notice of Apparent Liability for a forfeiture pursuant to Section 503(b)(1)(D) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

On February 21, 1992, after receiving a complaint alleging that Station WWST(FM),[1] Karns, TN, had broadcast indecent language in violation of 18 U.S.C. § 1464, we asked for your comments concerning certain material broadcast on April 10, 1991, at approximately 10:30 a.m. A transcript of the relevant passages, taken from a tape submitted with the complaint, was attached to our inquiry. That transcript, amended to reflect corrections and additions submitted with your response, is also appended here.

Section 1464 of Title 18, United States Code, prohibits utterances of "any obscene, indecent or profane language by means of radio communication." Pursuant to Sections 312(a)(6) and 503(b)(1)(D) of the Communications Act, the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464. The Commission has defined indecency as language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. *See Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987). The United States Court of Appeals for the District of Columbia Circuit has upheld the Commission's authority to restrict the broadcast of indecent material at times when there is a reasonable risk that children may be in the audience. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

You assert that the material in question, when viewed in context, was part of an editorial theme, designed to parody and poke fun at a competing radio station, and was not intended to be indecent. You state that you attempted to develop a series of announcements which would promote the fact that your station "rocked harder than the other station" and that your station "had more backbone, masculinity, etc.," than your competitor which "was playing wimpy rock songs." This context of parody and humor, you assert, becomes evident if the following introductory lines are added to the transcript of the broadcast provided by the Commission:

> MV: (Music) What would happen if a radio station could go to the doctor?
>
> M2: Well, Mister 1-0-4, what seems to be your problem?

With this addition, you contend, it is clear that the material aired was not intended to be, and was not, indecent. Furthermore, you state that the target audience for these announcements was essentially an adult male audience consisting primarily of construction workers, mechanics, and blue collar workers who listen to the radio on job sites, rather than minors who you believe would have been in school on a Wednesday morning when the announcements were broadcast. Finally, you believe that you are entitled to "clear and unequivocal guidelines defining indecency and prescribing the times and circumstances when such material may be broadcast." You contend that no such guidelines were in effect at the time of the broadcast in question.

We are not persuaded by your arguments. First, even accepting the context of the broadcast as you describe it, we find the material in question to be indecent. It contained repeated and deliberate use of explicit language describing male sexual organs and suggestive language, such as "we keep it harder, longer," which took on an inescapable sexual meaning in view of the explicit language used. We conclude that the material, taken in context, was patently offensive. The fact that the material may have been intended to "simply poke fun at the wimpy music being played" by your competitor -- or to poke fun at anything else -- does not alter our conclusion in this regard. *Compare, e.g., Notice of Apparent Liability to Guy Gannett Publishing Co.*, 6 FCC Rcd 3702 (MMB 1989), and *Memorandum Opinion and Order in the Matter of Liability of Guy Gannett Publishing Co.*, 5 FCC Rcd 7688 (MMB 1990) ($2,000 forfeiture imposed for broadcast of "Penis Envy Song" on WZTA-FM, Miami, FL). Furthermore, despite your claims to the contrary, the material was broadcast at a time of day (10:30 a.m.) when children were likely to have been in the listening audience. Finally, we reject your assertion that you lacked clear and unequivocal guidelines concerning the broadcast of indecent material at the time of the broadcast in April 1991. The Commission's definition of indecency was already well established at that time and, even though the Commission's 24-hour ban on the broadcast of indecent material was stayed pending judicial review, broadcasts of such material between the hours of 6:00 a.m. and 8:00 p.m. were still subject to potential sanctions, and had been for a considerable time prior to the broadcast of the announcements at issue.

[1] At the time, the station's call sign was WWZZ(FM). The new call sign became effective on May 20, 1994.

Thus, it appears that on April 10, 1991, Station WWST(FM) violated 18 U.S.C. § 1464 by airing indecent programming. Accordingly, pursuant to Section 503(b)(1)(D) of the Communications Act, WCKS Broadcasters, Ltd., is hereby advised of its apparent liability for a forfeiture of Four Thousand Dollars ($4,000), for its apparent violation of 18 U.S.C. § 1464 on April 10, 1991. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Act, including "the nature, circumstances, extent, and gravity of the violation."

The WWST(FM) broadcast is similar in nature to WZTA-FM's broadcast of the "Penis Envy Song," for which we assessed the maximum monetary penalty allowed per violation ($2,000) under the then applicable statute. *See also Cox Enterprises, Inc.*, 6 FCC Rcd 3704 (MMB 1989) ($10,000 Notice of Apparent Liability for five indecent broadcasts on WIOD(AM), Miami, FL, including "Penis Envy Song"). While these similarities might suggest that a forfeiture of $2,000 per violation would be appropriate, a separate countervailing consideration leads us to increase the per violation penalty assessed here, compared to those assessed in the earlier cases. Specifically, in the time since our initial decisions in WZTA-FM and WIOD, Congress has amended (Section 503(b) of the Act[2] to increase our maximum forfeiture authority from $2,000 per violation to $25,000 per violation, finding that the smaller amount might no longer serve as a meaningful sanction to wrongdoers or as a deterrent to others.[3] The amount we have assessed here reflects the intent of this amendment by increasing the penalty to a level ($4,000) that we believe will, in the circumstances of this case, provide a reasonable yet effective sanction and deterrent. We do not believe that a higher forfeiture is necessary or appropriate, given the limited scope of the apparent misconduct involved.[4]

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Radio Station WWST(FM), Karns, TN
Date/Time
Broadcast: April 10, 1991 at 10:30 a.m.
Material Broadcast: Station Promotional Announcements

MV: Male Voice

M2: Second Male Voice

M3: Third Male Voice

M4: Fourth Male Voice

MC: Male Caller

***

MV: (Music) What would happen if a radio station could go to the doctor?

M2: Well, Mister 1-0-4, what seems to be your problem?

MV: It's like I'm not myself any more. I feel wimpy and weak. I've lost my edge. Can you tell me what's wrong?

M2: Well, let's take an X-ray. (Buzzing sound) Mmm, yeah here's the problem Mister 1-0-4. Your testicles have shrunk. In fact, I can barely see them. They're so small it looks like you have none at all.

MV: Oh.

M3: It takes balls to rock hard. (Music)

M4: Z-93, we keep it harder, longer.

***

Crowd noise. Sound of gavel hitting wood.

MV: The court will come to order. Ah, will the plaintiff, Mister 1-0-4 rise. All right, what is your complaint.

M2: Ah, I'm wimpy and weak. I'm not myself. I've lost my edge and the radio doctor X-rayed my testicles and told me they had shrunk. See, here's the picture.

MV: Gee, they're so small I can hardly see them and it looks like you have none at all.

M2: I think the machine shrunk them.

MV: Well, did it sound like this? (Buzzing sound)

M2: Oh yeah, it did.

MV: My word, that's no X-ray. You stood in front of a flux capacitor. One point two one gigawatts went through your scrotum.

---

[2] Pub. L. No. 239, 101st Cong., 1st Sess., 103 Stat. 2131 (1989).

[3] *See* Budget Reconciliation Act, House Conf. Rep. No. 386 at 435, *reprinted in* 1989 U.S. Code Cong. & Ad. News at 3038.

[4] In *United States Telephone Ass'n v. FCC*, No. 92-1321 (D.C. Cir. July 12, 1994), the court set aside our *Policy Statement on Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied* 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993), in which we had established guidelines for determining appropriate forfeiture amounts for violation of various Commission rules and statutory provisions, including the indecency prohibition. In assessing this forfeiture, therefore, we have undertaken to apply directly the statutory factors in 47 U.S.C. § 503(b) to the particular facts of this case, giving due consideration to relevant intervening legislative changes and to our past decisions that predated the *Policy Statement*.

M2: Oh, I want my testicles back.

MV: Only a moron would put one point two one gigawatts in his testicles. Case dismissed Mister 1-0-4.

M2: I wish to appeal, your honor.

MV: You have no appeal left, Mister 1-0-4.

M2: Oh.

M3: It takes balls to rock hard. (Music)

M4: Z-93 we keep it harder, longer.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

JEM Communications, Inc.,
(Assignor)

and File No. BALCT-931013KI

Interstate General Properties
Limited Partnership, S.E.,
(Assignee)

For Consent to Assignment of
the License of WSJN-TV,
San Juan, Puerto Rico

Tele 38, Inc.
(Assignor)

and File No. BALCT-931013KH

Interstate General Properties
Limited Partnership, S.E.,
(Assignee)

For Consent to Assignment of
the License of WJWN-TV,
San Sebastian, Puerto Rico

Multi Media Television, Inc.
(Assignor)

and File No. BALCT-931013KG

Interstate General Properties
Limited Partnership, S.E.,
(Assignee)

For Consent to Assignment of
the License of WKPV(TV),
Ponce, Puerto Rico

MEMORANDUM OPINION AND ORDER

Adopted: August 29, 1994; Released: September 14, 1994

By the Commission:

1. The Commission has before it for consideration the unopposed applications of Interstate General Properties Limited Partnership, S.E. (IGP) to acquire the licenses of television stations: (1) WSJN-TV, Channel 24 (IND), San Juan, Puerto Rico, from JEM Communications, Inc. (JEM); (2) WKPV(TV), Channel 20 (IND), Ponce, Puerto Rico, from Multi Media Television, Inc., which wholly owns JEM; and (3) WJWN-TV, Channel 38 (IND), San Sebastian, Puerto Rico, from Tele 38, Inc. All three stations have been dark since 1989, when Hurricane Hugo damaged them, and the assignee intends to return all three to the air. No contour overlap exists between the San Juan and the San Sebastian stations, but the predicted Grade B contours of the San Juan and Ponce stations overlap, as do the predicted Grade A contours of the Ponce and San Sebastian stations. Thus, grant of the applications would authorize common control of television stations with predicted signal contour overlap inconsistent with the duopoly rule, Section 73.3555(b) of the Commission's Rules.

2. The duopoly rule, Section 73.3555(b) of the Commission's rules, generally prohibits common ownership or control of television stations with overlapping Grade B contours. However, IGP requests Commission consent to operate the Ponce station as a satellite of the San Juan station, pursuant to the satellite exception to the duopoly rule.[1] In addition, IGP seeks consent to operate the San Sebastian station as a satellite of the San Juan station.[2]

SATELLITE REQUEST FOR WKPV(TV), PONCE

3. *Background* Pursuant to the Commission's satellite policy, an applicant is entitled to a presumption that its proposed satellite operation is in the public interest if it meets three criteria: (1) no city-grade contour overlap exists between the parent and the satellite; (2) the proposed satellite would provide service to an underserved area;[3] and (3) no alternative operator is ready and able either to construct or to purchase and operate the satellite as a full-service station. *Television Satellite Stations*, 6 FCC Rcd 4212 (1991) (petitions for partial stay and reconsideration pending). If an applicant cannot qualify for the presumption, we will evaluate the proposal on an *ad hoc* basis to determine whether other compelling circumstances warrant grant of the application. *Id.* at 4214.

4. The applicant acknowledges that Ponce is not an underserved area, and that its proposal therefore does not meet one of the criteria necessary to qualify for the satellite

[1] We note that there is an outstanding proceeding that invites comment on whether television satellite stations should continue to be exempted from the national multiple ownership rules. *Second Further Notice of Proposed Rulemaking* in MM Docket No. 87-8, 6 FCC Rcd 5010 (1991). Grant of the applications now before us would not implicate the 12-station rule.

[2] While there is no overlap between the proposed parent and this satellite station, the satellite-to-satellite overlap (Ponce to San Sebastian) involved counsels that applicants submit a satellite justification for the San Sebastian station. *See Sidney T. Warner*, 3 FCC Rcd 4034, 4035, n.3 (1988); and *Central Minnesota Television, Inc.*, 2 FCC Rcd 6730 (1987).

[3] We have defined an "underserved area" as one in which there are two or fewer stations licensed to the satellite's community of license (the transmission test), or, alternatively, one in which 25% or more of the area within the satellite's Grade B contour and outside the parent's Grade B contour receives four or fewer television services (the reception test). If either of these two criteria is satisfied, the area is "underserved." *See Television Satellite Stations*, above, at 4215.

presumption. IGP asserts that authorization of satellite status for the Ponce station is nonetheless warranted on the facts of this case.

5. According to the applicant, the proposal meets the remaining two criteria required to meet the satellite presumption. First, IGP notes that there is no predicted city-grade contour overlap between the two stations. Second, IGP claims that no alternative operator is ready and able to purchase and operate the satellite as a full-service station. In this latter regard, according to the applicant, the Commission has recognized that satellite operations are the norm in Puerto Rico, due to the stringent economic circumstances and the unusually severe terrain conditions on the island.[4] Indeed, IGP claims that all of the stations licensed to Ponce except VHF station WSTE(TV), Channel 7, operate either as satellites or under rebroadcast agreements. Moreover, as to the particular stations involved here, the applicant states that the Ponce station has carried essentially the same programming as the San Juan station since the latter began operation in 1987,[5] and that the stations have been commonly owned since 1986. The applicant states that, in spite of the consequent economies of scale, WKPV(TV), Ponce, has remained dark since 1989. According to the applicant, these facts suggest that the Ponce station is unlikely ever to be acquired by a purchaser ready and willing to operate it as a full-service, stand-alone station.

6. In further support of this assertion, the applicant submits the affidavit of Franklin D. Lo'pez, the President of the San Juan and Ponce stations' licensees. He states that neither station was profitable before 1989, when Hurricane Hugo severely damaged both stations, destroying the WSJN-TV antenna and overturning the WKPV(TV) tower. According to Lo'pez, this damage made futile any effort to restore the stations to profitability. Lo'pez claims that he attempted to sell the two stations for three years after the hurricane, and that he did reach an agreement to sell them to Viva Television. However, he asserts that the agreement was subsequently terminated. Lo'pez alleges that he then listed the stations with two brokers, neither of whom was able to locate a buyer. Accordingly, the applicant concludes that there is no buyer willing and able to operate the Ponce station as a full-service facility.

7. IGP states that other circumstances also warrant grant of the application. The applicant asserts that the predicted Grade B overlap area encompasses 3.9% of the population and 11.6% of the land area within the San Juan station's predicted Grade B contour, and 13.4% of the population and 20.3% of the land area within the Ponce station's predicted Grade B contour. However, IGP notes that the two stations have nevertheless been under common control since 1986, pursuant to a waiver of the duopoly rule. In granting the waiver, the staff found that, due to the mountainous topography of Puerto Rico, the actual contour overlap would be smaller than the predicted overlap, and would consequently effect "no undue concentration of control of the media... in a manner contrary to the public interest." *Letter to Multi Media Television, Inc.* (Video Services Division, June 20, (1986). Further, the applicant contends that, due to subsequent facility modifications of both stations, the predicted overlap area is smaller than in 1986.[6]

8. The applicant adds that returning both stations to the air would serve the public interest. In support of this contention, IGP has submitted a technical analysis concluding that grant of the application will allow the restoration of service to 2,367,000 people in the San Juan area and 688,344 people in the Ponce area.

9. *Discussion* While the applicant does not fulfill all the requirements of a presumptive grant, we find that a persuasive showing has been made to justify satellite operation on the facts of this case. In the past, the Commission has recognized not only the unusual economic circumstances, but also the unique and extreme topography in Puerto Rico, as legitimate bases for authorizing satellite operations.[7] Puerto Rico is a geographically small broadcast market having more than 100 radio stations and more than 30 licensed or authorized television stations, with San Juan dominating the island's economy. Puerto Rico, as an island, is approximately 125 miles long (east to west) and thirty miles wide (north to south), bisected east to west by a central mountain range which effectively blocks television signals directed across its heights. Ponce is on the south coast, on the opposite side of the central mountain chain from San Juan. Thus, the area between the stations is so mountainous that neither's signal is likely to be received much beyond its immediate community of license.

10. There is no predicted city-grade overlap between the Ponce and San Juan stations, and, although there is predicted Grade B overlap between them, the actual Grade B overlap is likely to be small, due to the mountainous terrain in the area. Moreover, the predicted overlap in this case is comparable to that in other cases where we have authorized satellite operation. *See, e.g., Hector Nicolau,* above (authorizing an overlap of 34% of the area and 25% of the population within one station's predicted Grade B contour, and 26% of the area and 22% of the population within the other's).

11. Given the licensee's attempts to sell the Ponce station, we are persuaded that diligent efforts have been made to sell the station to an entity willing and able to operate it as a full-service, stand-alone facility, and that these attempts have been unavailing. Thus, while independent ownership and operation of WKPV(TV) would be preferable, it does not appear to be possible. We have previously noted that all of the stations licensed to Ponce except one[8] operate as satellites or operate pursuant to rebroadcast agreements (essentially functioning as non-commonly owned satellites). *Canal 48* at 2194. Moreover, even with the rebroadcast agreement, neither the San Juan nor the Ponce station had

---

[4] The applicant cites *Canal 48,* 8 FCC Rcd 2193, 2194 (1993).

[5] In addition, as discussed below, IGP states that, under a rebroadcast agreement, WJWN-TV, San Sebastian, has also carried the programming of the San Juan station.

[6] In granting the duopoly waiver, the staff noted that the predicted overlap encompassed 4.2% of the population and 12.5% of the land area within the San Juan station's Grade B contour, and 13.9% of the population and 23.6% of the land area within the Ponce station's Grade B contour.

[7] *See, e.g., Canal 48,* above; *Hector Nicolau,* 5 FCC Rcd 6370 (1990).

[8] The exception is station WSTE(TV), which operates as a system of multiple cochannel transmitters, simultaneously broadcasting, because of the difficulty of providing service in such mountainous terrain. *Siete Grande Television, Inc.,* 7 FCC Rcd 5299 (1992).

been profitable. It appears unlikely that WKPV(TV) will be restored to the air in the near future as a stand-alone facility. We believe that grant of the satellite request is the surest way to restore service to Ponce and provide an additional choice of programming to its residents. Thus, we conclude that authorizing satellite operation of WKPV(TV), Ponce, would serve the public interest. However, in view of the fact that other full-service stations are licensed to Ponce, we will require WKPV(TV) to establish a studio within eighteen months of commencement of operations and to originate some local programming. *Id.*

SATELLITE REQUEST FOR WJWN-TV, SAN SEBASTIAN

12. *Background* With respect to the San Sebastian station, the applicant acknowledges that the station's predicted Grade A and Grade B contours overlap those of the Ponce station. According to IGP, the predicted overlap area encompasses 38.8% of the land area and 37.9% of the population within the San Sebastian station's predicted Grade B contour, and 43.7% of the land area and 41.8% of the population within the Ponce station's predicted Grade B contour. However, the applicant cites several factors that it contends make grant of its proposal in the public interest.

13. First, the applicant contends that while there is a predicted city-grade overlap between the Ponce and San Sebastian stations, the rugged terrain conditions of the area prevent actual overlap. IGP supports its contention with an engineering study utilizing the Longley-Rice Communications Systems Performance Model, or Tech Note 101.[9] The applicant also asserts that the Commission has previously acknowledged the substantial reception loss caused by the terrain in the area. IGP cites *Hector Nicolau*, above, which involved a contour overlap between Ponce and Aquadilla, Puerto Rico, UHF television stations. The Commission stated that "while the predicted overlap ... is not insubstantial, the areas [sic] between the stations is mountainous and neither station is likely to be received much beyond its immediate community of license." *Hector Nicolau* at 6371. IGP alleges that both Aquadilla and San Sebastian are located on the northwestern portion of the island, with the former on the coast and the latter 12 miles inland. Thus, according to the applicant, the terrain that separates the two stations in the application before us is the same mountainous terrain that warranted grant of satellite status in *Hector Nicolau*. Consequently, IGP claims that, as in that case, the terrain-adjusted overlap area between the San Sebastian and Ponce stations is substantially less than the predicted overlap area.

14. Second, the applicant claims that San Sebastian is an underserved area, noting that WJWN-TV is the only television station licensed to San Sebastian, a community with a population of approximately 38,500 people. Third, the applicant states that, because of the distressed circumstances discussed above that it shares with the Ponce and San Juan stations, no available buyer is ready and willing to operate the San Sebastian station as a full-service, stand-alone station. In this regard, IGP submits the affidavit of Hayde'e Di'az, the President of the San Sebastian station's licensee. He states that all of the television stations in the San Sebastian-Mayaguez-Aquadilla area must rebroadcast the programming of other Puerto Rico stations in order to survive. He adds that the San Sebastian station rebroadcast the programming of WSJN-TV, San Juan, from 1987, when it began operation, until 1989, when damage caused by Hurricane Hugo caused it to go dark. He also contends that the station has been offered for sale without success. Specifically, Di'az claims that he approached several potential buyers after 1989, but that none was interested in operating the station as a stand-alone station. Thus, he concludes that no possibility exists of so operating the station.

15. Finally, as discussed above, the applicant notes that the San Sebastian station has been dark for five years. Thus, grant of the application would restore service to the population of the San Sebastian area. In this regard, IGP claims that 759,000 people reside within the station's predicted Grade B contour.

16. *Discussion* Based on the facts before us, we find that the public interest would be served by satellite operation of WJWN-TV, San Sebastian. First, grant of the application would restore to service the only television station licensed to San Sebastian. Further, the terrain between the two UHF stations causes significant signal blockage, making it likely that actual Grade B overlap will be substantially less than predicted.[10] *See Hector Nicolau*, above. In fact, we have previously determined that useful television service for stations in Puerto Rico often does not extend beyond the Grade A contour, and is sometimes not satisfactory even within that area. *See, e.g., Id.* at 6371; *Zaida Perez Vda. de Perez Perry*, FCC 85-831 (released July 26, 1985). In addition, the Commission has recognized that the economic and terrain conditions in Puerto Rico generally necessitate satellite or rebroadcast operations. *Id.* at 6371-72; *Canal 48* at 2194.

17. Finally, based upon the applicant's representations and the station's history, it does not appear that the station can be sold to any entity that would operate it as a stand-alone facility. Thus, restoration of San Sebastian's only television voice could be accomplished only by satellite operation. Accordingly, pursuant to our *ad hoc* analysis, we conclude that satellite operation of WJWN-TV, San Sebastian, is warranted.

CONCLUSION

18. We conclude that the proposed satellite operation of stations WKPV(TV), Ponce, and WJWN-TV, San Sebastian, is justified. Having found the applicant to be fully qualified in all other respects, we conclude that grant of the applications would serve the public interest, convenience, and necessity.

19. Accordingly, IT IS ORDERED, that the application for consent to assign the license of station WKPV(TV), Ponce, Puerto Rico, from Multi Media Television, Inc., to Interstate General Properties Limited Partnership, S.E. IS GRANTED, subject to the following condition:

[9] Tech Note 101 provides a model for predicting the effect of irregular terrain on signal propagation.

[10] Moreover, our review of the applicant's terrain-adjusted engineering statement shows that no city-grade contour overlap exists between the stations.

The licensee will establish a main studio and commence origination of some local programming no later than 18 months after television station WKPV(TV) starts operating.

20. IT IS FURTHER ORDERED that the application for consent to assign the license of station WSJN-TV, San Juan, Puerto Rico, from JEM Communications, Inc., to Interstate General Properties Limited Partnership, S.E. IS GRANTED.

21. IT IS FURTHER ORDERED, that the application for consent to assign the license of station WJWN-TV, San Sebastian, Puerto Rico, from Tele 38, Inc., to Interstate General Properties Limited Partnership, S.E. IS GRANTED.

22. IT IS FURTHER ORDERED that the staff of the Mass Media Bureau shall send copies of this Memorandum Opinion and Order to the applicants by certified mail - return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Fouce Amusement	CSR-4060-M
Enterprises, Inc. against	CA0495
King Videocable Company System	
(Colony Communications, Inc.)	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: August 30, 1994; Released: September 15, 1994

By the Chief, Cable Services Bureau:

1. On September 8, 1993, a petition on behalf of Fouce Amusement Enterprises, Inc., licensee of Station KRCA(TV) (Ind., Ch. 62), Riverside, California, was filed with the Commission claiming that King Videocable Company System (Colony Communications, Inc.) ("King"), operator of a cable television system serving Lake Elsinore, California, had declined to carry the station, even though Station KRCA(TV) is a "local" signal within the meaning of §4 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), in the Los Angeles ADI, where the cable system is located. No opposition to this petition has been filed.

2. In support of its petition, Station KRCA(TV) states that in a letter dated April 1, 1993, it notified King of its election of must-carry status and that it would convert its programming from Home Shopping Network to a new format by June 1, 1993. Further, Station KRCA(TV) states that King did not send the May 3, 1993, notice required by Section 76.58(d) of the Rules specifying the reason, if any, for declining to provide must-carry rights. However, Station KRCA(TV) states that on May 28, 1993, King did send a carriage lineup notice that did not indicate carriage of its station. On June 16, 1993, Station KRCA(TV)'s chief engineer informed King that it was expected to be carried and that it had antennas and preamps available at its studio which it could provide to King to improve the reception of its signal, if necessary. After receiving no response, Station KRCA(TV) states that on July 27, 1993, it sent a notice of noncompliance with the mandatory carriage rules to King, and that the only explanation it had received for the system's failure to comply with its statutory and regulatory obligations, was an informal statement that the station was not being carried because it broadcast home shopping programming. Station KRCA(TV) states that it no longer broadcasts home shopping programming, and has not for quite some time.

3. Station KRCA(TV) further states that on July 30, 1993, the system finally sent a notice purportedly pursuant to §76.58(b) of the Rules, which identified for the first time a signal quality issue and the fact that in light of additional required costs of delivering a good quality signal, if the station does not agree to bear these costs, it may deny carriage. This letter, asserts Station KRCA(TV), did not reflect the use of generally acceptable engineering practices and did not meet the threshold requirements establishing inadequate signal quality. On August 5, 1993, in response to the system's notice of July 30, 1993, Station KRCA(TV)'s engineer noted that the system had mistakenly measured signal quality of its UHF signal with VHF equipment, and that if good engineering practices were used, a quality signal should easily be obtained. Station KRCA(TV)'s engineer states that he measured the station's signal at A-38 dBm at ground level at the system's headend. In this connection, Station KRCA(TV)'s engineer stated that he was available to work with the system's technical staff to resolve the signal quality issue and could provide the system with Scalla Antennas and Preamps if these were necessary. Also, in its letter of August 5, 1993, the system was asked to inform Station KRCA(TV) by August 27, 1993, whether and when it would commence carriage of its signal. Station KRCA(TV) asserts that it stands ready to provide any necessary receive equipment. Station KRCA(TV) further states that while it has more than once offered to provide the system with additional equipment to allow it to receive an adequate signal, and has offered to work with the system's technical staff to resolve the signal quality issue, the system has only responded with inadequate excuses for refusing to commence carriage of its signal.

4. Section 614(h)(1)(b)(iii) of the Communications Act of 1934, as amended, provides the requisite signal levels for VHF and UHF commercial stations at a cable system's headend. For UHF commercial stations, such as KRCA(TV), a standard of -45 dBm has been established. In this instance, the system apparently determined KRCA(TV)'s signal strength to be below the requisite level for a UHF commercial station using VHF equipment. Generally, if the test results are less than -51 dBm for a UHF station, we believe that at least four readings must be taken over a two-hour period. Where the initial readings are between -51 dBm and -45 dBm, inclusive, we believe that the readings should be taken over a 4-hour period with measurements not more than four hours apart to establish reliable test results. This is the best evidence of the availability of a station at a subject system headend.

5. In addition to the information required by our rules to be furnished to the affected station when there is a dispute over signal level measurements, cable operators are expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when tests were done. When measured against these criteria, we conclude that the determination made by the system is insufficient to demonstrate that Station KRCA(TV)'s signal is not of good quality. Additionally, we note in any event that Station KRCA-TV has repeatedly offered to bear the costs of providing a good quality signal. The Commission in *Report and Order in MM Docket No. 93-8*, FCC 93-345, 8 FCC Rcd 5321 (1993), found that stations with home shopping formats are entitled to must-carry status. Consequently, we will not address the arguments raised by King concerning Station KRCA(TV)'s format.

6. We find that Station KRCA(TV) is a qualified UHF station and that it is entitled to carriage on the Lake Elsinore, California cable system. Accordingly, the complaint filed September 8, 1993, by Fouce Amusement Enterprises, Inc., IS GRANTED pursuant to §614(c) (47 U.S.C. §534(c)) of the Communications Act of 1934, as amended, and King Videocable Company System (Colony Communications, Inc.) IS ORDERED to commence carriage of Station KRCA(TV) forty-five (45) days from the date of this Order unless King submits within fifteen (15) days the engineering data required herein to support its assertion of poor signal quality from Station KRCA(TV) at King's principal headend. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Acting Chief
Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-94

In re Applications of

SCRIPPS HOWARD BROADCASTING COMPANY — File No. BRCT-910603KX

For Renewal of License of
Station WMAR-TV
Baltimore, Maryland

and

FOUR JACKS BROADCASTING, INC. — File No. BPCT-910903KE

For a Construction Permit for a
New Television Facility on
Channel 2 at Baltimore, Maryland

MEMORANDUM OPINION AND ORDER

Adopted: September 8, 1994; Released: September 15, 1994

By the Commission:

I. INTRODUCTION

1. By this Memorandum Opinion and Order, we deny the Petition for Expedited Order Authorizing Deposition of Commission Employee, filed April 26, 1994, by Four Jacks Broadcasting, Inc. (Four Jacks).[1] Pursuant to 47 C.F.R. §1.311(b)(2), which provides that Commission personnel may be questioned by deposition for purposes of discovery only on special order of the Commission, Four Jacks seeks to depose a Commission attorney concerning his activities while employed at the law firm that represents Scripps Howard Broadcasting Company in this proceeding. It claims that the FCC attorney has direct personal knowledge of facts that are critical to the resolution of post-hearing character issues specified against Scripps Howard. We find, for the reasons set forth below, that section 1.311(b)(2) was intended to require an order of the Commission to permit the deposition of FCC personnel only to the extent that a party seeks to depose such personnel concerning matters related to their employment at the agency. We clarify that, even with respect to requests to depose FCC personnel that are clearly within the intended scope of the rule, we would not entertain such a request in the absence of an affirmative finding of relevance by the ALJ. Since the ALJ has ruled that there is no need to take the deposition of this or any other attorney that was employed by the law firm representing Scripps Howard, we will deny Four Jacks' petition.

II. BACKGROUND

2. Scripps Howard Broadcasting Company (Scripps Howard) is the licensee of station WMAR-TV in Baltimore, Maryland. Its renewal application is mutually exclusive with Four Jacks' application for a construction permit to construct a new television station on Channel 2 in Baltimore, Maryland. By Memorandum Opinion and Order, FCC 94M-50 (Feb. 1, 1994), Administrative Law Judge Richard Sippel added issues against Scripps Howard to determine whether it had made material misrepresentations or lacked candor with respect to certain documents concerning WMAR-TV's claimed renewal expectancy.

3. The licensee filed a motion for summary decision on the character issues. In support of the motion Scripps Howard submitted a declaration under penalty of perjury from the law firm employee (now an FCC attorney), which, *inter alia*, reflects that during his tenure at the law firm he assisted in reviewing the documents concerning WMAR-TV's claimed renewal expectancy.

4. By Memorandum Opinion and Order, FCC 94M-177 (Mar. 18, 1994), the ALJ denied Scripps Howard's motion for summary decision without prejudice to its consideration after further discovery and testimony. At the same time, the ALJ noted that the character issue was framed in terms of Scripp Howard's candor and that the advice of counsel with respect to this matter would not be attributed to Scripps Howard to support an adverse finding under that issue. *Id.* at ¶ 11. Accordingly, the ALJ ruled that "there was no basis for discovery of any of Scripps Howard's attorneys." *Id.*

5. Notwithstanding that ruling, Four Jacks sought to depose, *inter alia*, the attorney now employed by the FCC concerning his activities while employed as an associate at the licensee's law firm.[2] Ruling on oppositions to the Notice of Deposition, the ALJ indicated that, pursuant to section 1.311(b)(2) of the rules, he "w[ould] not order [the FCC attorney's] deposition or testimony without an order of the Commission." Memorandum Opinion and Order, FCC 94M-268 ¶ 6 (Apr. 15, 1994). Alternatively, the ALJ concluded that, given his earlier ruling that there was no basis for discovery of any of Scripps Howard's attorneys, taking the deposition would be "unlawful and oppressive." *Id.* at ¶ 6 & n.2.

6. Four Jacks requests that the Commission authorize the taking of the deposition. In support of that request, Four Jacks urges that the FCC attorney has direct personal knowledge of facts that are critical to the resolution of the character issues against Scripps Howard. Four Jacks cites the FCC attorney's declaration under penalty of perjury reflecting his intimate involvement in this matter. According to Four Jacks, Scripps Howard has waived any attor-

[1] The following pleadings are also pending before the Commission: (a) an Opposition, filed May 6, 1994, by Scripps Howard Broadcasting Company; (b) an Opposition, filed May 6, 1994, by the Mass Media Bureau; and (c) a Consolidated Reply, filed May 18, 1994, by Four Jacks Broadcasting, Inc.

[2] Four Jacks also sought to depose a station employee, a former station employee, and a paralegal at the licensee's law firm.

ney-client privilege with respect to any facts contained in the declaration by submitting the declaration to support its motion for summary decision on the character issues. Based upon the attorney's involvement in this matter Four Jacks claims to have an "immense" need for his deposition testimony.

III. DISCUSSION

7. We will deny Four Jacks' request for an expedited order authorizing the deposition of the FCC attorney. By its express terms, section 1.311(b)(2) provides that a Commission employee may not be deposed for discovery purposes concerning any matter except on special order of the Commission.[3] The rule, however, was not intended to require Commission authorization for depositions of FCC personnel where the request to depose arises out of circumstances totally unrelated to their Commission employment.

8. Turning to the facts in this case, the ALJ has determined that there is no basis for discovery of any of Scripps Howard's legal counsel, including an FCC attorney and former associate of the law firm that represents Scripps Howard. Without considering the propriety of that ruling, which is not properly before us, we would not order the deposition at this time even if the request concerned matters directly related to the attorney's employment at the agency.[4] To the extent that Four Jacks claims that the attorney has personal knowledge warranting the taking of his deposition, its pleading is in effect an unauthorized appeal of the ALJ's interlocutory ruling that there is no reason to permit discovery of any of Scripps Howard's legal counsel. Under these circumstances, no further consideration of Four Jacks' contentions is warranted at this time.[5]

IV. ORDER

9. ACCORDINGLY, IT IS ORDERED That the petition for expedited order authorizing deposition of Commission employee, filed April 26, 1994, by Four Jacks Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

---

[3] See *Amendment of Part 1 Rules of Practice and Procedure To Provide for Certain Changes in the Commission's Discovery Procedures in Adjudicatory Hearings*, 91 FCC 2d 527, 530-31 ¶ 12 (1982), in which the Commission indicated its continued belief that it would not "be sound policy to authorize the judges to order depositions of Commission personnel." It explained that this could subject the Commission's staff to 'a multiplicity of demands' because '[t]he Commission is ... in a different position from that of private parties, who will normally be called upon to give depositions only in the single case in which it is participating,' citing *Report and Order on Discovery Procedures*, 11 FCC 2d at 188.

[4] The ALJ's ruling is an interlocutory ruling that would not be appealable as a matter of right under 47 C.F.R. § 1.301(a), and, unless the ALJ authorized appeal of that ruling pursuant to 47 C.F.R. § 1.301(b), the merits of that ruling would be ripe for consideration only upon appeal of the initial decision. See 47 C.F.R. § 1.301(b).

[5] In those situations in which the presiding judge has made an affirmative finding that there is a basis for discovery as to matters that are clearly within the scope of a Commission employee's employment at the FCC, the Commission will entertain a request to depose that Commission employee pursuant to section 1.311(b)(2) of the Commission's rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-100

In the Matter of

Amendment of Section 73.202(b), RM-8509
Table of Allotments,
FM Broadcast Stations.
(Okmulgee, Nowata and Pawhuska,
Oklahoma)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 8, 1994; Released: September 15, 1994

Comment Date: November 7, 1994
Reply Comment Date: November 22, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed jointly by Integrated Broadcasting Company, Inc., licensee of Station KTHK(FM), Okmulgee, Oklahoma, and KRIG, Inc., licensee of Station KRIG(FM), Nowata, Oklahoma ("petitioners"). The petitioners request the substitution of Channel 231C1 for Channel 231C2 at Okmulgee and the modification of Station KTHK(FM)'s license accordingly, as well as the substitution of Channel 286C3 for Channel 232A at Nowata, Oklahoma, and the modification of Station KRIG(FM)'s license accordingly.[1] To accommodate the allotment of Channel 286C3 to Nowata, petitioners also request the substitution of Channel 280A for vacant and unapplied-for Channel 285A at Pawhuska, Oklahoma.

2. We believe the public interest would be served by proposing the substitution of Channel 231C1 for Channel 231C2 at Okmulgee and the substitution of Channel 286C3 for Channel 232A at Nowata, Oklahoma, since it could provide both communities with wide coverage area FM services and enable the respective stations to expand their coverage areas. In accordance with Section 1.420(g) of the Commission's Rules, the licenses of Stations KTHK(FM) and KRIG(FM) can be modified without providing an opportunity for the filing of competing expressions of interest since the proposals constitute upgrades on co- and adjacent channels, respectively.[2] We also propose the substitution of Channel 280A for vacant and unapplied-for Channel 285A at Pawhuska, Oklahoma. However, we note that Channel 285A was allotted to Pawhuska in 1985 and remains unoccupied. Therefore, should no party express an intention to apply for the channel in the context of this proceeding, we will delete the channel, without replacement, if the proposed channel changes for Okmulgee and Nowata are ultimately granted.

Technical Summary

3. Channel 231C1 can be allotted to Okmulgee in compliance with the Commission's minimum distance separation requirements at Station KTHK(FM)'s presently licensed site, which is 27.5 kilometers (17.1 miles) northwest of the city. Channel 286C3 can be allotted to Nowata, with a site restriction of 13.6 kilometers (8.4 miles) northwest, to avoid a short-spacing to the construction permit site of Station KBXT, Channel 287C3, Bixby, Oklahoma, and to accommodate KRIG, Inc.'s desired transmitter site. Use of this site restriction does not obviate the short-spacing to the reference coordinates for Channel 287C3 at Bixby. Therefore, final action in this proceeding may be withheld pending the licensing of Station KBXT at the site specified in its outstanding construction permit (BMPH-930819IZ). Alternatively, Channel 285A can be allotted to Nowata at Station KRIG's presently licensed site, which is 12.0 kilometers (7.4 miles) northwest. Channel 280A can be allotted to Pawhuska with a site restriction of 8.4 kilometers (5.2 miles) northwest.[3]

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
	Option I	
Okmulgee, Oklahoma	231C2	231C1
Nowata, Oklahoma	232A, 268A	268A, 286C3
Pawhuska, Oklahoma	285A	

[1] Should the Commission not modify Station KRIG(FM) to specify operation on Channel 286C3, KRIG Radio states that it will accept a modification to Channel 285A. In accordance with Commission policy, Integrated Broadcasting also states its willingness to reimburse Station KRIG(FM) for the reasonable costs associated with its change of channel, if the station's license is modified to specify operation on Channel 285A in lieu of its present Channel 232A.

[2] Channel 286C3 is mutually exclusive with Channel 232A at Nowata due to the IF spacing requirement for frequencies which are 53 and 54 channels apart.

[3] The coordinates for Channel 231C1 at Okmulgee are 35-50-02 North Latitude and 96-07-28 West Longitude. The coordinates for Channel 286C3 at Nowata are 36-46-13; 95-45-17. The coordinates for Channel 285A at Nowata are 36-44-35; 95-45-17. The coordinates for Channel 280A at Pawhuska are 36-44-00; 96-23-00.

Option II

Okmulgee, Oklahoma	231C2	231C1
Nowata, Oklahoma	232A, 268A	268A, 285A
Pawhuska, Oklahoma	285A	280A

Option III

Okmulgee, Oklahoma	231C2	231C1
Nowata, Oklahoma	232A, 268A	268A, 285A
Pawhuska, Oklahoma	285A	--

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **November 7, 1994**, and reply comments on or before **November 22, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Mark N. Lipp, Esq.
Mullin, Rhyne, Emmons and Topel, P.C.
1225 Connecticut Avenue, Suite 300
Washington, D.C. 20036
(Counsel to Integrated Broadcasting Company, Inc.)

Lawrence N. Cohn, Esq.
Cohn & Marks
1333 New Hampshire Avenue, N.W.
Suite 600
Washington, D.C. 20036-1573
(Counsel to KRIG, Inc.)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required*. Comments are invited on the proposal(s) discussed in the *Notice of Proposed RuleMaking* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures*. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment onthem in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered ascomments in the proceeding, and Public Notice to this effect will be given as long as

they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-162

In the Matter of

Local Exchange Carriers' Rates,
Terms, and Conditions for
Expanded Interconnection for
Special Access

Pacific Bell Transmittal No. 1727
Revisions to Tariff
F.C.C. No. 128

MEMORANDUM OPINION AND ORDER

Adopted: August 29, 1994; Released: September 1, 1994

By the Chief, Tariff Division:

1. On July 21, 1994, Pacific Bell filed Transmittal No. 1727 to revise its Tariff F.C.C. No. 128. Pacific Bell proposes adding three additional wire centers to the list of wire centers where it will offer expanded interconnection service. Pacific Bell states that the purpose of this filing is to respond to *bona fide* requests from customers for expanded interconnection service in the BVHLCA01, COTNCA11 and RVSDCA01 central offices, located at Beverly Hills, Colton and Riverside, California, respectively. Description and Justification at 1. No petitions were filed against this tariff. Transmittal No. 1727 is scheduled to take effect on September 4, 1994.

2. This transmittal raises the same issues regarding cost allocation, rate levels, rate structures, and terms and conditions of service as those identified in the *Expanded Interconnection Tariff Order*.[1] Therefore, Transmittal No. 1727 is suspended for one day, until September 5, 1994, and will be subject to the investigation initiated in the *Expanded Interconnection Tariff Order*. These rates will also be subject to an accounting order to facilitate any refunds that may later prove necessary.

3. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the revisions to Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1727, ARE SUSPENDED for one day and an investigation of the referenced tariff transmittal IS INSTITUTED.

4. IT IS FURTHER ORDERED that Pacific Bell SHALL FILE tariff revisions within five business days of the release date of this Order to reflect this suspension.

5. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59. Pacific Bell should cite the "DA" number of the instant Order as the authority for this filing.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), Pacific Bell shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Ameritech Operating Companies, *et. al*, CC Docket No. 93-162, 8 FCC Rcd 4589 (Com. Car. Bur. 1993) (*Expanded Interconnection Tariff Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLEAMERICA CORPORATION CSR-4024-P

v.

TIMES MIRROR CABLE TELEVISION, INC.

Exclusivity and Unfair Practices Program
Access Complaint

ORDER

Adopted: September 7, 1994; Released: September 9, 1994

By the Chief, Cable Services Bureau:

1. On August 10, 1993, CableAmerica Corporation ("CableAmerica") filed a Complaint against Times Mirror Cable Television, Inc. ("Times Mirror") pursuant to 47 U.S.C. § 548(d) and 47 C.F.R. § 76.1003. In its Complaint, CableAmerica alleges that Times Mirror has refused to sell the Arizona Sports Programming Network ("ASPN") to CableAmerica's Mesa, Arizona cable system in violation of Section 628 of the Communications Act of 1934, as amended, 47 U.S.C. § 548, and 47 C.F.R. §§ 76.1001 and 76.1002(c)(2).

2. CableAmerica is a multichannel video programming distributor operating cable television systems, including (since 1988) a cable system in Mesa, Arizona. American Cable Television, Inc. ("ACT") d/b/a Dimension Cable Services ("Dimension") is a wholly-owned subsidiary of Times Mirror. Dimension also operates a cable system in Mesa, and Dimension carries ASPN on its Mesa cable system. ASPN's programming consists of professional and other live sporting events featuring teams based in Arizona or otherwise of interest to Arizona residents. Dimension distributes ASPN to its individual cable systems. According to CableAmerica, Times Mirror has refused CableAmerica's request to purchase ASPN programming for its Mesa system, which places CableAmerica at a significant competitive disadvantage in the Mesa market.

3. On September 9, 1993, Times Mirror filed an answer along with a motion to dismiss the complaint, arguing that ASPN is not satellite delivered programming, and is therefore not properly the subject of a complaint under Section 628 of the Communications Act. CableAmerica filed a reply on September 29, 1993, and a corrected reply on September 30, 1993, arguing that ASPN does meet the definition of satellite cable programming under the Commission's rules.

4. On September 1, 1994, the parties through their attorneys filed a request for dismissal fashioned as a Stipulation for Dismissal with Prejudice, requesting that pursuant to their Settlement Agreement and Release dated August 29, 1993, the Commission dismiss the complaint with prejudice. The Stipulation further states that each party bears its own costs and attorneys' fees.

5. The Commission encourages resolution of program access disputes through negotiations between the parties in an effort to avoid time-consuming, complex adjudication. Such a policy favoring private settlement and alternative dispute resolution conserves Commission resources and is thus in the public interest. *See* First Report and Order in MM Docket No. 92-265, 8 FCC Rcd 3359, 3389, 3416 (1993).

6. We thus find that it is in the public interest to terminate this proceeding pursuant to the settlement negotiated by the parties.

7. Accordingly, IT IS ORDERED, that the Complaint of CableAmerica IS DISMISSED WITH PREJUDICE. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-93

In the Matter of

Amendment of Subpart E of Chapter 1
of the Commission's Rules Governing
Procedures to Be Followed When
Informal Complaints Are Filed Against
Common Carriers

ERRATUM

Released: September 16, 1994

This Erratum corrects an error in the *Notice of Proposed Rulemaking*, FCC 94-211, released in the above-captioned proceeding, on September 2, 1994.

Sentence 5 in Paragraph 13 is corrected to read as follows:

> Copies of this submission may be purchased from the Commission's copy contractor, **ITS, Inc. 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 (202) 857-3800**, and in Room 246 at 1919 M Street, N.W. Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Acting Chief
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

AT&T FILES PETITION FOR WAIVER OF THE PER-PHONE COMPENSATION REQUIREMENT FOR PAY TELEPHONES

ERRATUM

Released: September 16, 1994

This Erratum corrects an error in the *Public Notice*, DA 94-951, released in the above-referenced proceeding on August 30, 1994.

Sentence 4 in Paragraph 3 is corrected to read as follows:

> A copy of this petition for waiver and any subsequent filed documents in this matter may be obtained from **ITS, Inc. 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 (202) 857-3800.**

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

DIANNE FEINSTEIN,
JOHN SEYMOUR, THOMAS HAYES,
et. al

Against Station KABC-TV
Los Angeles, California

ERRATUM

Released: September 16, 1994

On March 18, 1994, the Commission released an Order, DA 94-247, 9 FCC Rcd 1586, in the above-captioned proceeding. The last sentence in paragraph 11 is corrected to read:

We find that complainants have not established a *prima facie* case with respect to their allegation that KABC impermissibly raised its rates.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Guam Telephone Authority
Petition for Declaratory Ruling

Columbia Communications Corporation
Petition for Order Suspending
Guam Telephone Authority Conversion
From CAMA/ANI Protocol to Feature Group D

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1994; Released: September 16, 1994

By the Commission:

I. INTRODUCTION

1. On July 29, 1993, the Guam Telephone Authority ("GTA") filed a petition requesting that the Commission issue a declaratory ruling: (i) specifying the equal access protocol for Guam; and (ii) stating that the implementation of Feature Group D ("FGD") on Guam is not a violation of the Communications Act, or of any outstanding Commission order or directive. On July 30, 1993, the Columbia Communications Corporation ("Columbia") filed a petition requesting that the Commission issue an order directing GTA to cease all activities associated with converting to FGD. For the reasons that are stated below, the GTA petition is granted and the Columbia petition is denied.

II. BACKGROUND

2. On June 2, 1992, the Commission issued a decision stating that GTA had violated the Communications Act by engaging in anticompetitive practices, including the use of a nonstandard interface that made it more difficult for interexchange carriers to enter the long distance market on Guam.[1] That decision also required GTA to show cause why it should not be required to have lawful access tariffs on file with the Commission. On April 19, 1993, GTA filed an Integrated Compliance Plan ("ICP") and Interim Tariff that GTA states is "intended to lead GTA into conformance with Mainland practices as soon as possible."[2] The ICP stated that GTA will file a usage-sensitive access tariff.[3]

3. GTA's end office switch protocols are not able to measure traffic. GTA argues that the ability to measure is necessary, as a practical matter, for the administration of a usage-sensitive tariff. GTA states that it would be necessary to add software to its existing CAMA/ANI programming to acquire a measurement capability, whereas FGD already contains measurement software.[4] GTA requested by letter a determination on its choice of equal access protocol.[5] On June 14, 1993, the Acting Chief, Common Carrier Bureau responded to GTA's request, stating that FGD is superior to GTA's existing CAMA/ANI protocol and that FGD would further interexchange competition, which is the objective of equal access.[6] On July 2, 1993, MCI filed a letter arguing that the June 14 letter does "not constitute a definitive Commission resolution of GTA's equal access responsibilities," and requested that the Commission issue a decision resolving GTA's interconnection responsibilities.[7] On July 29, 1993, GTA filed the petition currently before us, requesting *inter alia*, that the Commission specify the equal access protocol that should be used on Guam. In a separate petition, Columbia requests that the Commission rule that GTA's existing CAMA/ANI, with usage measurement software added, is the appropriate equal access protocol to use on Guam.[8]

III. POSITIONS OF THE PARTIES

4. Columbia, IT&E Overseas, Inc. ("IT&E"), and MCI oppose conversion to FGD. Columbia argues that it will not be able to compete effectively in an advertising war for presubscribed customers, and that CAMA/ANI does not require presubscription. Columbia, IT&E, and MCI object that FGD requires each subscriber to dial five, rather than three, digits to access an IXC that is not that subscriber's primary carrier. IT&E and MCI contend that ten interexchange competitors (the maximum number possible under CAMA/ANI) operating in the Guam market is sufficient, and that it is not necessary to adopt a protocol that would permit more than ten competitors to originate calls from Guam. IT&E also states that FGD would permit IXCs from the mainland and Hawaii to terminate calls on Guam, at lower rates, without going through a firm like IT&E to terminate their calls. IT&E contends that this additional competition would weaken Guam-based interexchange carriers, like IT&E. IT&E argues that FGD will not work on Guam because Guam has a 671 country code rather than a mainland area code, and because Guam, as part of World Zone 6, is not part of the North American Numbering Plan (which is part of World Zone 1).

---

[1] IT&E Overseas, Inc. and PCI Communications Inc. Petition for Emergency Relief and Expedited Declaratory Ruling, 7 FCC 2d 4023 (1992) (*"Show Cause Order"*).

[2] GTA Petition at 5.

[3] Integrated Compliance Plan and Reply of GTA (Apr. 19, 1993) at 3.

[4] GTA Petition at 4-5, quoting GTA's ICP at 15. CAMA/ANI ("Centralized Automatic Message Accounting/Automatic Number Identification") is the signalling protocol presently used on Guam, and is somewhat similar to the Feature Group C ("FGC") protocol that is still used in some portions of the United States. *See* GTA comments (Aug. 28, 1993) at 5. However, unlike the mainland version of FGC, where access is provided only to one interexchange carrier, on Guam, CAMA/ANI provides multi-carrier access pursuant to a three-digit dialing scheme.

[5] *See* Letter from V. Ahern, Counsel to GTA, to C. Tritt, Chief, Common Carrier Bureau (Aug. 18, 1992).

[6] Letter from K. Levitz, Acting Chief, Common Carrier Bureau to V. Ahern, Counsel to GTA (June 14, 1993).

[7] Letter from R. Singer, Counsel to MCI, to K. Levitz, Acting Chief, Common Carrier Bureau, at 7 (July 2, 1993) ("MCI Letter").

[8] *See, e.g.*, GTA Petition at 8; Columbia Petition at 10-11.

5. Management Communications Services ("MCS"), a telecommunications consulting firm, states that, as the dominant IXCs on Guam, IT&E and MCI oppose FGD because FGD will increase competition, and thereby threaten the dominant market positions that IT&E and MCI enjoy on Guam. GTA also argues that CAMA/ANI's technical incompatibility with other carrier signalling has supported a duopoly that has permitted MCI and IT&E to split the Guam market "almost right down the middle."[9] Sprint and MCS contend that the Commission has already decided that three digit carrier access is not "equal access," since the essential elements of equal access are presubscription, carrier selection, and "1+" dialing. GTA states that it does not want Guam to become a technological backwater as a consequence of being tied to a customized CAMA/ANI software package for which general developmental upgrades will not occur. Sprint and GTA state that measurement software for CAMA/ANI does not exist. GTA and Northern Telecom, Inc. (GTA's switch and programming supplier) state that custom measurement software for CAMA/ANI would be expensive to develop.

IV. DISCUSSION

A. Equal Access Generally

6. "Equal access" interconnection in the United States is based on the Commission's policy of creating, "on a nationwide basis, opportunities for competitive providers of interstate and foreign services to access their subscribers through interconnection with local telephone companies' facilities."[10] The standard applicable to independent telephone companies (*i.e.*, companies that were not part of the Bell System) was based on the equal access standard developed by the divestiture court for the Bell Operating Companies.[11] The Commission subsequently defined "equal access," or "Feature Group D access," as being that form of exchange access that allows "end users to access facilities of a designated interexchange carrier (IXC) by dialing '1' only. The end user has the additional capability of using other IXCs by dialing a five-digit access code (10XXX). Presubscription is the process that enables end users to select a primary IXC prior to a central office conversion to equal access."[12] This form of equal access has been implemented throughout the contiguous 48 states, and has also been implemented on the island communities of Hawaii, Puerto Rico, and the U.S Virgin Islands.[13]

7. No party to this proceeding contends that GTA should not provide some form of "equal access." Instead, the issue that is raised is whether CAMA/ANI or FGD best serves the public interest.

B. Comparison of CAMA/ANI and FGD

1. Promoting Interexchange Competition

8. We conclude that FGD is superior to CAMA/ANI from the perspective of fostering a more competitive interexchange market for common carrier communications services originating, and terminating, on Guam for the following reasons. FGD permits access to more than 900 interexchange carriers. The present three digit CAMA/ANI access code limits the number of interexchange carriers that can serve Guam to 10.[14] At first glance, as stated by MCI and IT&E, ten IXCs serving Guam might seem to be "sufficient." However, GTA states that "*at present*, there are at least *eleven* carriers known to GTA who are existing competitors, or who are authorized by the FCC to provide service, or who have requested service from GTA or who have a substantial presence on Guam."[15]

9. Poised on the Pacific rim, with tourism and commerce that have increased at an accelerating pace, Guam has a robust long distance communications market that has been growing rapidly.[16] For the number of subscribers on the island (approximately 55,000 access lines), Guam has a large long distance market that is estimated by the *Pacific Daily News* at $120,000,000.[17] According to GTA, interexchange carrier revenues before operating expenses increased by almost 800% between 1987 and 1992.[18] GTA states that because it is "almost impossible to make accurate predictions about the size of this market in the

---

[9] GTA Reply Comments (Sept. 7, 1993) at 5-6.

[10] MTS and WATS Market Structure, 94 FCC 2d 292, 296-7 (1983) (*"MTS/WATS Phase III"*).

[11] *MTS/WATS Phase III, supra* at 297, 304; MTS and WATS Market Structure, Phase III Report and Order, 100 FCC 2d 860, 873-78, 887-88(1985) (*"MTS/WATS Phase III Report and Order"*). The term "equal access" was initially defined in *United States v. AT&T* as access "equal in type, quality, and price to that provided to AT&T and its affiliates." *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) ("MFJ").

[12] Access and Divestiture Tariffs, 101 FCC 2d 911(1985).

[13] In addressing the issue of equal access on Puerto Rico, the Commission concluded that three digit access to competitive interexchange carriers did not constitute equal access, where it was still possible to access one interexchange carrier on a "1+" dialing basis. In the Matter of Policies to be followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Service off the Island of Puerto Rico, 2 FCC Rcd 6600, 6603, 6605-09, 6618 n.64 (1987). *See also* Abbreviated Dialing Arrangement, 2 FCC Rcd 6758, 6761 (1987) (An abbreviated dialing arrangement did not constitute full equal access, and therefore did not warrant charging full equal access rates).

[14] The single digit that is available under CAMA/ANI for identifying interexchange carriers can be populated with values ranging from 0 to 9, which limits the number of interexchange carriers that can be accessed under that protocol to 10. In contrast, FGD 1+ dialing connects the subscriber directly to the subscriber's preselected interexchange carrier, and also permits the subscriber to choose other interexchange carriers by dialing 1 + 0 + XXX, where XXX represents the carrier identification number of the chosen interexchange carrier. The three separate digits (XXX) that can be specified by the subscriber under FGD permits the FGD subscriber to choose among more than 900 interexchange carriers, as compared with the 10 interexchange carriers that can be accessed under CAMA/ANI.

[15] GTA Comments at 9. The carriers identified by GTA are: Asian American Telecom, AT&T, Columbia, GTE Hawaiian Telephone, Island Long Distance Company, IT&E, Micro Business Systems, MCI, PCI, Sprint, and Worldcom. *Id.*

[16] *See, e.g.*, IT&E Overseas, Inc. Reply to GTA Answer to Show Cause (Feb. 9, 1993), Attachment - Miscellaneous Guam Business Trade Articles.

[17] *Pacific Daily News*, "Open Door To More Phone Competition," (Aug. 24, 1993).

[18] GTA Comments (Aug. 27, 1993) at 9-10. *See also* GTA Reply Comments (Sept. 7, 1993) at 4, n.7 (GTA's estimate may be conservative).

future, imposing a technological limitation on the number of carriers that can enter that market is contrary to 'the objective of equal access: the promotion of interexchange competition.'"[19] We agree. Imposing an unnecessary and artificial limitation on the number of IXCs that can serve Guam, by retaining the existing CAMA/ANI protocol, would limit the potential benefits from interexchange carrier competition, and would further disadvantage Guamanian citizens of the United States.[20]

10. Moreover, the use of a non-standard interface makes it more difficult, time-consuming, and expensive for an interexchange carrier to interconnect efficiently. For example, before IT&E purchased a new switch that can accommodate the special CAMA/ANI protocols, IT&E originally requested that GTA provide FGD, stating that under "the existing scheme, the modified CAMA interface provided by GTA does not permit IT&E to connect directly to our DMS international gateway switch. FG-D signaling will enhance the trunking interface allowing full utilization of our DMS switch. An intermediate switch is currently necessary to convert from the CAMA protocol to FG-D. Should FG-D signaling protocol be made available by GTA, then the toll trunks can directly interface with our DMS switch, thereby eliminating the need for the intermediate switch."[21]

11. Retention of a non-standard interface provides a continuing barrier to entry to potential IXC competitors, protecting from additional competition those IXCs that have already adapted to the peculiarities of GTA's CAMA/ANI protocol. For these reasons, we conclude that FGD will better promote competition for IXC services originating and terminating on Guam.[22]

2. Technological Advancement.

12. The CAMA/ANI protocol used on Guam is not used by any other telephone company in the United States,[23] where the standard equal access protocol has been, and continues to be, FGD.[24] As a consequence, manufacturers of telecommunications equipment and software have designed, and are likely to continue to design, their products to be compatible with FGD, not CAMA/ANI.[25] Future exchange access service developments on Guam, therefore, would likely require specialized equipment and/or software specifically tailored for the unique protocol characteristics of the Guam market. This would necessarily involve additional delay and expense to "retrofit" GTA's exchange carrier operations (assuming that it would be possible to do so) so that Guamanians would be able to benefit from, and enjoy, communications services developments that had occurred elsewhere in the United States.[26]

13. Section 7(a) of the Communications Act states that it "shall be the policy of the United States to encourage the provision of new technologies and services to the public,"[27] and Section 1 states that the Communications Act was adopted "to make available, so far as possible, to *all* the people of the United States a *rapid, efficient* . . . communications service at *reasonable charges* . . . ."[28] GTA, Sprint, and others have expressed concern that Guam would become a technological "backwater," with inferior communications services, if GTA were compelled to continue utilizing the CAMA/ANI protocol.[29] We agree. In adopting FGD throughout the United States, the Commission recognized that it had an obligation to foster both nationwide and worldwide communications services, and accordingly needed to prevent communications services from becoming "balkanized," through inconsistent or non-uniform interconnection standards. It is clear from the record before us that continuing, specialized, custom modifications to GTA's CAMA/ANI software would be required to permit GTA to accommodate new services and features available elsewhere in the United States, and that these modifications, if possible, are likely to become available later and then, most probably, at substantially higher cost than under FGD. Guamanians even now are unable to avail themselves of the full range of communications service features that can be provided elsewhere in the United States through FGD served exchanges.[30]

---

[19] GTA Comments (Aug. 27, 1993) at 10, quoting letter from K. Levitz, Acting Chief, Common Carrier Bureau, to V. Ahern, GTA Counsel (June 14, 1993).

[20] Even IT&E, which in its early years of operation as a reseller continuously demanded that GTA provide FGD (including demands that were made as recently as 1992) and now opposes FGD in favor of CAMA/ANI, recognizes that CAMA/ANI retards competition. In IT&E's words: "[L]ower cost FGD access pricing plus the elimination or even the hint of any technical incompatibility with CAMA/ANI, will make direct termination of inbound traffic economically feasible by a few, very high volume carriers, such as MTC, GTE/HTC, *and the first and second tier mainland IXCs*." IT&E Comments at 19, n.29 (emphasis supplied). We do not believe that limiting competitive entry through retention of CAMA/ANI is in the public interest.

[21] GTA Reply Comments (Sept. 7, 1993), Attachment A (Letter from J. Borlas, IT&E, to J. Underwood, GTA, (Mar. 9, 1992)).

[22] Contrary to the arguments of Columbia, we do not believe that carrier costs in participating in the presubscription process tips the balance in favor of CAMA/ANI. As on the mainland, FGD equal access allows carriers to compete by seeking presubscribed customers and/or individual access code calls. Columbia has not persuaded us that there are any relevant differences on Guam.

[23] Letter from V. Ahern, Counsel to GTA, to K. Levitz, Acting Chief - Common Carrier Bureau (July 12, 1993), Attachment C (Letter from J. Underwood, GTA, to Sen. T. Ada at 2-3).

[24] GTA is the only exchange carrier in the United States with more than 50,000 access lines that is not equipped with FGD software. Management Communications Services Comments (Aug. 27, 1993), Exhibit B (Testimony of R. Kelly, Jr.).

[25] *See* GTA Comments (Aug. 27, 1993), Attachment C. For example, FTS 2000 is not compatible with CAMA/ANI. Letter from J. Underwood, GTA, to Sen. T. Ada (July 12, 1993) at 3, n.3 (Attachment C to Letter from V. Ahern, Counsel to GTA, to K. Levitz, Acting Chief, Common Carrier Bureau, dated July 12, 1993). Moreover, CAMA/ANI does not benefit from the Exchange Carrier Standards Association expertise that has developed with respect to the technical features of FGD. *See* Sprint Comments (Aug. 27, 1993) at 7.

[26] *See, e.g.*, GTA Comments (Aug. 27, 1993), Attachment C.

[27] 47 U.S.C. § 157.

[28] 47 U.S.C. § 151 (emphasis supplied).

[29] *See, e.g.*, GTA Comments (Aug. 27, 1993) at 15-16; GTA Reply Comments (Sept. 7, 1993), Attachment D; Sprint Reply Comments at 6, n.4.

[30] For example, at this point in time, the absence of FGD precludes Guamanians from receiving "Dialable Wideband Access" (NTXR66AA), "Private Virtual Network" (NTX983/AB), "Private Virtual Networking" (NTX983AB), "Enhanced Meridian Digital Centrex WATS" (NTXE96AA), "Equal Access on

3. Other Considerations.

a. Measurement.

14. GTA's CAMA/ANI software does not permit GTA to measure interexchange carrier access minutes.[31] As a consequence, GTA presently must rely upon the representations of each interexchange carrier to determine the compensation that it should receive for the use of its facilities. This lack of measurement capability has produced unnecessary controversy, leading, for example, to a claim that IT&E underpaid GTA by more than $3,000,000 during 1990-1991.[32] The lack of measurement capability has also necessitated the use, and expenditures attendant to the use, of auditors to check interexchange carrier records to determine whether or not GTA has been adequately compensated.

15. Accurate measurement is essential to determining how GTA's interstate revenue requirement will be collected from competing interexchange carriers that utilize GTA's facilities, and whether GTA's interstate and foreign services access tariffs are "just and reasonable" within the meaning of Section 201(b) of the Communications Act.[33] MCI asserts that GTA can acquire usage measurement capability by simply adding traffic measurement software to CAMA/ANI, instead of using FGD software.[34]

16. FGD software contains measurement capabilities that have been thoroughly tested and used throughout the United States. In contrast, the record in this proceeding indicates that no measurement software has yet been created for GTA's CAMA/ANI, and no developmental work for producing such software has been undertaken.[35] Moreover, GTA, quoting its switch manufacturer, states that it would be "extremely expensive" to develop measurement software for CAMA/ANI.[36] As a consequence, any measurement software created for GTA's CAMA/ANI would require additional time to develop and install, and apparently would be "extremely expensive," as well.

b. Numbering.

17. We find unpersuasive IT&E's contention that FGD cannot be implemented by GTA because Guam is in World Zone 6 and has a country code, rather than the type of area code that exists in the contiguous 48 states under the North American Numbering Plan for World Zone 1. Although IT&E states that FGD access cannot work in World Zone 6,[37] GTA states that it will implement FGD so that calls to Guam from the mainland will still use the international ("011") dialing pattern, while calls to the U.S. mainland from Guam will be on a "1+" basis.[38] GTA further states that a similar conversion to FGD occurred in the Commonwealth of the Northern Mariana Islands ("CNMI"), which is also in World Zone 6. GTA argues that although IT&E encountered difficulties in adapting to FGD in the CNMI, the problems were due to "IT&E's own switch modifications."[39] GTE, a large mainland exchange carrier that also has exchange carrier operations in Hawaii and the Northern Pacific, has had extensive experience in converting to FGD throughout its operating areas. It contends that "FGD can work in these overseas locations outside the North American Numbering Plan. FGD equal access has been in place and operating successfully in the CNMI since June 17, 1993."[40]

c. Access Codes

18. Under CAMA/ANI, each GTA subscriber must dial a three-digit access code to reach an interexchange carrier on each long-distance call instead of the "1+" dialing that is possible with FGD served end offices.[41] Under FGD, selection of a carrier other than the presubscribed IXC requires a five-digit dialing sequence.

19. After considering this question carefully, we have concluded that the benefits of being able to reach the carrier most frequently utilized by dialing one digit, rather than three digits, outweighs any benefits of being able to reach other IXCs using three, rather than five, digit dialing. One digit access is also faster than three-digit access for long-distance emergency calls from Guam, where a rapid

---

Meridian Digital Centrex/Datapath" (NTX186AA E.O. FGD S/W). *See, e.g.*, Attachment E to GTA Reply Comments (Sept. 7, 1993)(Letter from S. Bayerkohler, Northern Telecom Inc., to J. Underwood (Sept. 3, 1993)). *See generally*, GTA Comments (Aug. 27, 1993), Attachment D.

[31] Sprint Reply Comments (Sept. 7, 1993) at 7; IT&E Reply Comments (Sept. 7, 1993), Declaration of W.C. Phillips at 4.

[32] GTA Reply Comments (Sept. 7, 1993) at 6-7, n.15.

[33] Sprint states that because GTA cannot measure IXC access minutes, prior to the development of a cost-based tariff, GTA would first need to conduct costly audits, or require the IXCs to conduct such audits of the IXCs' traffic. Sprint Reply Comments (Sept. 7, 1993) at 7. According to Sprint, such "audits would have to continue well into the future and likely become a source of constant controversy (*see, e.g., Bellsouth Telephone Companies, Revisions to Tariff F.C.C. No. 4 (Transmittal No. 276)*), 5 FCC Rcd 716 (1990)." *Id.* Such a process would be time consuming, expensive, likely to engender continuing controversy, and would most likely be necessary on an on-going basis absent FGD measurement capability.

[34] MCI Comments (Aug. 2, 1993) at 2; Letter from R. Singer, Counsel for MCI, to K. Levitz, Acting Chief, Common Carrier Bureau (July 20, 1993) at 3.

[35] *See* Letter from V. Ahern, Counsel to GTA, to K. Levitz, Acting Chief, Common Carrier Bureau (July 12, 1993), Attachment C, Letter from J. Underwood, GTA, to Sen. T. Ada (July 12, 1993) at 4.

[36] GTA Comments (Aug. 27, 1993) at 17. *See also id.* at Attachment C (Letter from Northern Telecom to GTA, dated Aug. 11, 1993).

[37] IT&E Comments (Aug. 27, 1993) at 9.

[38] GTA Comments (Aug. 27, 1993) at 6.

[39] GTA Reply Comments (Sept. 7, 1993) at 10, quoting a letter from G. Polivy, Counsel for the Micronesian Telephone Company, to G. Vogt, Chief, Common Carrier Bureau Tariff Division (June 9, 1993).

[40] GTE Comments (Sept. 7, 1993) at 2.

[41] For example, MCI can be accessed on Guam by dialing 001. Thus, to place a call on Guam to the contiguous 48 states via MCI, the customer would dial 01," + "1" [U.S.] + the area code + the number. MCI Comments (Aug. 27, 1993) at 12, n.13. In placing calls to Guam from the 48 contiguous states, the customer would dial 11" + 671 + the local number on Guam. *See id.* Because Guam is not included in the North American Numbering Plan, and instead is accessed by using a country code (*i.e.*, "671"), GTA states that it will implement FGD so that calls to Guam from the mainland will still use the international (11") dialing pattern, while calls to the U.S. mainland from Guam will be on a "1+" basis. GTA Comments (Aug. 27, 1993) at 6. *See generally id.* at 11 (Guam is in World Zone 6; mainland United States is in World Zone 1).

response may be essential to the national defense, or the safety of life or property.[42] Given the frequency of typhoons on Guam, the recent earthquake, and Guam's remoteness from other portions of the United States, this consideration may be of particular importance.

C. Implementation: Timing, Presubscription Balloting, and Tariffs.

20. We conclude that the benefits of FGD should be available to the people of Guam, and those calling Guam, as soon as possible.[43] To achieve that objective, we first direct GTA, immediately after the release of this order, to provide, to each interexchange carrier serving Guam and each interexchange carrier that has expressed, or expresses, an interest in serving Guam, all technical and other information that is necessary to convert to FGD and to participate in the process of FGD presubscription balloting. Second, immediately thereafter, we direct GTA to initiate, and follow, the Commission's FGD equal access implementation requirements, and provide FGD access to all interexchange carriers serving Guam in accordance with existing Commission precedent.[44] Because of the benefits that FGD will bring to GTA's subscribers, it is our intention that interexchange carriers serving Guam use FGD trunk-side access, rather than any inferior form of access to GTA's facilities.

D. Compliance With The Communications Act And Commission Orders.

21. GTA installed stored-program-control switches containing generic FGD software in 1988.[45] After receiving numerous requests for FGD,1.[46] and after having been informed by the Acting Chief, Common Carrier Bureau, that it could proceed with FGD,[47] GTA was in the process of activating FGD when MCI and IT&E objected that GTA's conversion to FGD would violate the *Show Cause Order*.[48] The *Show Cause Order* stated, in relevant part: (i) that GTA shall not disconnect or otherwise impair or degrade service to any interstate or foreign interexchange common carrier; and (ii) that GTA shall not alter the grade of service received by any interstate or foreign interexchange common carrier in the absence of a duly acknowledged, written request therefor.[49]

22. In its petition, GTA requested a ruling that its efforts to implement FGD, after receiving the Acting Bureau Chief's letter, did not violate the Communications Act or our *Show Cause Order*.[50] To eliminate unnecessary litigation and controversy, and to remove any uncertainty about this matter, we grant GTA's request and declare that GTA's efforts to implement FGD did not violate the Communications Act or the *Show Cause Order*. In addition, because this Memorandum Opinion and Order requires GTA to use FGD equal access for all interexchange carrier switched access, GTA will not be violating the *Show Cause Order* or the Communications Act by exclusively providing FGD access to interexchange carriers, or by including provisions incorporating that exclusion in its interstate and foreign services tariffs.[51]

VI. CONCLUSION

23. In this order, we conclude that the implementation of FGD is in the public interest, as expressed in Sections 1 and 7 of the Communications Act. We have arrived at that conclusion for all of the reasons that are contained in this order, but in particular because FGD will promote interexchange competition, facilitate the technological development of new communications services, and provide reliable measurement software at lesser cost.

VII. ORDERING CLAUSES

24. ACCORDINGLY, IT IS ORDERED, pursuant to the authority that is contained in Sections 1, 4(i)-(j), 7, and 201-202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 157, 201-202, THAT the Petition of Columbia Communications Corporation IS DENIED, AND THAT the Petition of the Guam Telephone Authority IS GRANTED;

25. IT IS FURTHER ORDERED, pursuant to the authority contained in Sections 1, 4(i)-(j), 5(c), 7, 201, 202, and 205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i)-(j), 155(c), 157, 201, 202, and 205 THAT the Guam Telephone Authority SHALL IMPLEMENT Feature Group D Equal Access as stated in paragraphs 20, and 22 *supra;*

26. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 416 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 416, THAT the Secretary SHALL SERVE a copy of this Memorandum Opinion and Order upon GTA's designated agent, Veronica Ahern, Suite 800, One Thomas Circle, N.W., Washington, D.C. 20005 and upon each party to this proceeding.

27. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 408 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 408, THAT this Memorandum Opinion and Order IS EFFECTIVE upon release so that benefits of FGD access on Guam, as expressed in

---

[42] *See, generally,* 47 U.S.C. § 151.

[43] We direct the Chief, Common Carrier Bureau, to take the steps that are necessary to effectuate the conversion of interexchange carriers serving Guam and GTA to FGD equal access.

[44] Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 911 (1985); *recon. denied,* 102 FCC 2d 503; Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 935 (1985); Policies and Rules Concerning Changing Long Distance Carriers, 7 FCC Rcd 1038 (1992).

[45] Letter from V. Ahern, Counsel to GTA, to K. Levitz, Acting Chief, Common Carrier Bureau (July 12, 1993), Attachment C, Letter from J. Underwood, GTA, to Sen. T. Ada (July 12, 1993) at 4); GTA Comments (Aug. 27, 1993) at 18; GTA Answer to Show Cause Order (Jan. , 1993) at 15.

[46] IT&E's requests for FGD access began in 1985 and concluded in 1992; Sprint requested FGD access in 1993; PCI requested FGD access in 1992. *See, e.g.,* GTA Reply Comments (Sept. 7, 1993) at 6-7, n.15, and references cited therein; *id.* at Attachment C.

[47] Letter from K. Levitz, Acting Chief, Common Carrier Bureau, to V. Ahern, Counsel to GTA and designated agent in the District of Columbia for service of process to GTA (June 14, 1993).

[48] Letters from R. Singer, Counsel for MCI, to K. Levitz, Acting Chief, Common Carrier Bureau (July 2, 1993; July 20, 1993); Letter from V. Toth, IT&E, to K. Levitz, Acting Chief, Common Carrier Bureau (July 7, 1993).

[49] *Show Cause Order* at 4027.

[50] GTA Petition at 10-11; GTA Reply Comments (Sept. 7, 1993) at 17-18.

[51] *MTS/WATS Phase III, supra* at 306, para. 33.

Sections 1 and 7 of the Communications Act, 47 U.S.C. §§151, 157, can be made available as soon as possible to the Territory of Guam.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LDDS COMMUNICATIONS, INC. d/b/a LDDS METROMEDIA — File No. I-T-C-94-291

Application for authority to acquire on an IRU basis and operate capacity in the PTAT-1 Cable System between the United States and specified international locations

ORDER AND AUTHORIZATION

Adopted: August 22, 1994; Released: September 16, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require authorization of LDDS Communications, Inc. d/b/a LDDS Metromedia (LDDS) to acquire and operate the facilities specified herein.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-291 IS GRANTED and LDDS is authorized to:

a. acquire on an Indefeasible Right of User (IRU) basis and operate 5 E-1 half-circuits in the PTAT-1 Cable System, with matching half-circuits provided by LDDS's correspondents in the countries listed in the attached Appendix;

b. acquire on an IRU basis a one-half interest in appropriate connecting facilities; and

c. use these facilities for the provision of international message telephone service (IMTS) between the U.S. and the countries listed in the attached Appendix and in accordance with the totals set forth in its application (not to exceed 5 E-1 half-circuits).

3. IT IS FURTHER ORDERED that neither LDDS nor any persons or companies directly or indirectly controlling or controlled by LDDS, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which LDDS or any persons or companies controlling or controlled by LDDS are parties.

4. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements, including the applicable accounting rate, it enters into with its foreign correspondents with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for the use of any additional circuits it wishes to operate via the PTAT-1 Cable System.

8. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

Algeria
Austria
Belgium
Czech Republic
Denmark
Finland
France
Germany
Greece
Hungary
Iceland
Ireland
Italy
Morocco
Netherlands
Norway
Poland
Portugal
Slovakia
Spain
Sweden
Switzerland
Tunisia
Turkey

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 13, 1994

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for fee decisions in response to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. On a monthly basis, a public notice is released and the entire text of these fee decisions is published in the FCC Record.

The decisions are placed in General Docket 86-285 and are available for public inspection. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director fee decisions are released for public information:

Abundant Life, Inc. - Petition for reconsideration for a new FM station at Hattiesburg, Mississippi - **Denied** (July 28, 1994).

Dynacom Corporation - Request for refund of a hearing fee for a new FM station at Marlboro, Vermont - **Granted** (July 26, 1994).

Fireweed Communications Corporation - Request for a ruling clarifying the Commission's Report and Order, Implementation of Section 9 of the Commissions Act, 59 F.R. 30984 (June 16, 1994) - **Clarified** (August 4, 1994).

IDB WORLDCOM, Inc. - Request for refund and waiver of a filing fee submitted in connection with its application for a license at Puerto Rico - **Denied** (August 4, 1994).

KB Broadcasting, Inc. - Request for refund of a hearing fee for a "new FM station at Blooming Prairie, Minnesota - **Granted** (July 29, 1994).

KES Communications, Inc. - Request for refund of a hearing fee for a new FM station at Waimea, Hawaii - **Granted** (August 3, 1994).

Lauryn Broadcasting Corporation - Request for refund of a hearing (fee for a new FM station at Beaumont, California - **Denied** (August 3, 1994).

WinCom Wisconsin Limited Partnership - Request for refund of a hearing fee for a new FM station at Kaukauna, Wisconsin - **Granted** (July 26, 1994).

WorldView Imaging Corporation - Request for determination of the applicable filing fee for authorization to launch and operate the WorldView remote sensing satellite system - **Determined** (August 4, 1994).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE PRIDE, CHIEF, FEE SECTION ON (202)632-0241.

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 26 1994

Richard H. Waysdorf, Esq.
Waysdorf & Van Bergh
1000 Connecticut Avenue, N.W.
Suite 504
Washington, D.C. 20036

Jerrold Miller, Esq.
Miller & Miller, P.C.
P.O. Box 33003
Washington, D.C. 20033

Re: File No. BPH-930208MA

Dear Messrs. Waysdorf and Miller:

This responds to a petition for reconsideration filed by Abundant Life, Inc. ("ABI"), former applicant for a new FM station at Hattiesburg, Mississippi, an opposition filed by Unity Broadcasters ("Unity"), ABI's reply to the opposition, and related pleadings.

ABI's application was dismissed by the Chief, FM Branch for failure to remit its hearing fee in accordance with the deadline established by the May 14, 1993, public notice. The public notice announced that ABI's application was mutually exclusive with those of Unity's and Community Broadcasting Company's ("Community"), and established July 19, 1993, as the hearing deadline.[1]

ABI contends that its application should be reinstated nunc pro tunc. Specifically, ABI claims that the public notice that established the hearing fee deadline was premature, in that it was issued three days before the amendment of right period expired on May 17, 1993. ABI states that the notice thus was defective and inconsistent with the Commission's procedures.[2]

---

[1] Community was subsequently dismissed for failure to file its hearing fee.

[2] In this connection, ABI cites language in the Report and Order that adopted the Commission's window processing procedures, which were not in effect at the time ABI filed its application. See Amendment of Sections 73.3572 and 73.3573 relating to Processing of FM and TV Broadcast Applications, 58 RR 2d 776, 785, recon. denied, 59 RR 2d 100 (1985), aff'd, Hilding v. FCC, 835 F.2d 1435 (9th Cir. 1985); see also n.7, infra. The language

ABI represents that its counsel had searched the FCC Daily Releases of Public Notices from May 17th, 1993 forward, and consequently missed the Notice, which had been released earlier. ABI further represents that its counsel had attempted to verify the findings of his search by also making inquiries to FM staff members and checking BAPS ONLINE, the FCC's "official publicly available database."[3] According to ABI, the staff members incorrectly advised ABI's counsel that no deadline had been established, and the database failed to list the deadline until after ABI's application was dismissed for failure to comply with the hearing fee deadline. ABI argues that its actions constituted reasonable diligence, that the agency's staff members and public database provided incorrect information, that ABI relied upon that incorrect information to its detriment, and that the agency should be estopped from enforcing the hearing fee deadline against ABI.

Unity opposes ABI's petition for reconsideration. Unity claims that the Commission in the past has established hearing fee deadlines prior to the end of the amendment of right period, and that ABI's counsel should have conducted a more thorough, extensive search of the FCC Releases. Unity further asserts that ABI's reliance on unofficial informational sources does not excuse its failure to comply with the hearing fee deadline. Unity also alleges that ABI had actual knowledge of the hearing fee deadline.[4]

In its reply, ABI denies having actual knowledge of the hearing fee deadline.[5] Moreover, ABI reiterates its claim that by

---

ABI quotes is only a generalized description of those procedures and does not mandate the sequence of events ABI suggests.

[3] ABI's Petition for Reconsideration at 6, 9.

[4] In this regard, Unity submitted the affidavits of its principal and that of Community's. According to the affidavits, both principals state that they met with and advised ABI's principal of the upcoming hearing fee deadline. They state that the meetings took place in June or July prior to the applicable July 19, 1993, hearing fee deadline, but could not provide the exact dates.

[5] ABI submits the affidavits of its principal and shareholder, wherein they state that the meetings between the competing applicants occurred sometime in March or April of 1993, prior to the May 14, 1993 public notice, but could not provide exact dates. ABI also speculates that Community, the dismissed applicant, may be Unity's "silent partner" and thus motivated to falsify the record.

directing its inquiries to the Commission's staff members and by checking the Commission's publicly available database, it had justifiably relied on "formal and official" agency informational sources.[6] According to ABI, since the Commission neither publishes in the Federal Register nor serves personal notice of hearing fee deadlines, the public must rely on such informational sources and where those sources do not accurately represent the hearing fee deadlines, the Commission cannot enforce the deadlines against applicants that lack actual knowledge thereof.

Hearing fees must be timely filed. Absent timely tendered fee payments, applications are subject to immediate dismissal. See 47 U.S.C. Section 158(c)(2); 47 C.F.R. Sections 1.1107, 1.1110; see also Establishment of a Fee Collection Program, 2 FCC Rcd 947, 956-57 (1987). The Commission's rules specifically require applicants to file their hearing fees by a date certain as set forth in public notices issued shortly after they file their applications. See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157, 158 (1990). The Commission's authority to establish procedural deadlines by public notice has been recognized. See Hispanic Information and Telecommunications Network, Inc. v. FCC, 865 F.2d 1289, 1295-96 (D.C. Cir. 1989). The Commission acknowledges that strict enforcement of such procedural deadlines may lead to harsh results, such as the dismissal of applications, but has insisted upon such enforcement absent compelling or extraordinary circumstances. See Hispanic Information and Telecommunications Network, Inc. v. FCC, 865 F.2d at 1295-96; Florida Institute of Technology v. FCC, 952 F.2d 549, 553-54 (D.C. Cir. 1992); Nazarene Theological Seminary Radio Corp., 52 RR 2d 559, 563 (1982); Way of Life Television Network, Inc., 67 FCC 2d 90, 93 (1977); Bronco Broadcasting Co., Inc., 58 FCC 2d 909, 913 (1976); Prairie Broadcasting Co., 47 FCC 2d 373, 377-78 (1974); Community Broadcasting Co., 44 FCC 1931, 1933-34 (1960).

In adopting the window filing procedures for FM applications, the Commission did not state that the public notices, which establish mutual exclusivity of and hearing deadlines for applications, must be issued after the end of the amendment of right period. See Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications, 7 FCC Rcd 5074 (1992). Indeed, the Commission's rules do not require that such public notices be issued at any specific time. Section 73.3573(g) states:

> (2) All applications received during the appropriate filing period or "window" which are found to be mutually exclusive will be designated for hearing ... The FCC will

---

[6] ABI's Reply to the Opposition at 9-10.

> periodically release a Public Notice listing applications pending hearings or grant and announcing a date (not less than 30 days after issuance) by which petitions to deny must be filed.
>
> (i) In addition to announcing the acceptance of mutually exclusive applications and establishing a date for the filing of petitions to deny such applications, the public notice referred to in paragraph (g)(2)will also announce the date on which all mutually exclusive applicants will be required to pay the hearing fee ... The date for fee payment shall be at least 30 days after the date established for petitions to deny.

The 30/60 day restrictions govern the petition to deny and hearing fee deadlines, not the release of the public notices, which establishes those deadlines and which are issued "periodically." [7] Thus, the release of the May 14, 1993 public notice was neither defective nor inconsistent with the Commission's procedures.[8] Further, it is incumbent upon applicants to prosecute diligently their applications by ascertaining and complying with the applicable filing deadlines established by public notices. See, e.g., Florida Institute of Technology v. FCC, 952 F.2d at 553-54; Hispanic Information and Telecommunications Network, Inc. v. FCC, 865 F.2d at 1295-96. In ascertaining the applicable deadline, applicants must thoroughly search the official FCC Releases subsequent to the filing of their applications. By confining its search to the period following the amendment of right period, ABI unfortunately missed the applicable public notice. ABI's incomplete search of the FCC Releases, while unfortunate, does not constitute "compelling" or "extraordinary" circumstances that would warrant waiver of the hearing fee deadline.

Moreover, contrary to ABI assertions, its inquiries to staff members and search of the Commission's database did not constitute "formal" inquiries made to "official" sources. Applicants that rely upon the representations of staff members do so at their peril; applicants must ascertain information from the

---

[7] Indeed, even under the "hard look" FM procedures, the Commission authorized the staff to issue Notice of Acceptance of mutually exclusive FM applications (triggering the petition to deny deadlines) prior to the staff's engineering review, in the interest of expediting the processing of FM applications. See Public Notice, 5 FCC Rcd 990, 990 (1990).

[8] In fact, there were seventeen applications placed on the May 14, 1993 public notice, less than 30 days after tender. All those applicants timely paid their hearing fees, except ABI and Community.

Messrs. Waysdorf and Miller

Commission's official documents, such as the FCC issued public notices. See Mary Ann Salvatoriello, 6 FCC Rcd 4705, 4707-08 (1991); Texas Media Group, Inc., 5 FCC Rcd 2851, 2852 (1990); 220 Television, Inc., 81 FCC 2d 575, 577 (1980); Camelot, Inc., 61 FCC 2d 15, 16 (1976). Additionally, Section 0.434(e) of the Commission's rules explicitly caution applicants that the Commission's publicly available databases are not deemed official agency records and "should not be relied upon by the public because in some instances the data bases and the lists may not agree with the primary [official] sources of information." Under the circumstances, it does not appear that ABI's reliance upon such unofficial informational sources should constitute grounds to limit this agency from strictly enforcing the hearing fee deadline.[9]

Based on the foregoing, we do not find compelling or extraordinary circumstances present that would warrant setting aside the hearing fee deadline and reinstating nunc pro tunc ABI's application.

Accordingly, ABI's petition for reconsideration is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

[9] Indeed, it is not at all clear whether the estoppel doctrine may be successfully asserted against a government agency. See OPM v. Richmond, 110 L.Ed. 387, 397-400 (1990)

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

JUL 2 6 1994

David G. O'Neil, Esq.
Greenberg, Bracken & Tran
709 Prince Street
Alexandria, Virginia 22314

Re: Dynacom Corporation
New FM Station
Marlboro, Vermont
Fee Control # 9305148170012001

Dear Mr. O'Neil:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above-referenced submission (§ 1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission had adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

__X__ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

David G. O'Neil, Esq.

_____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
For Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

AUG 4 1994

OFFICE OF
MANAGING DIRECTOR

Jeremy Lansman, President
Fireweed Communications Corporation
3700 Woodland Dr., #600
Anchorage, Alaska 99517

Dear Mr. Lansman:

This is in response to your request for a ruling clarifying the Commission's Report and Order, Implementation of Section 9 of the Communications Act, 59 F.R. 30984 (June 16, 1994).

Fireweed Communications Corporation (Fireweed) is the licensee of Television Station KYES, Anchorage, Alaska. You suggest that, under the rules implementing Section 9, markets are defined by using the rankings found in the Television and Cable Fact Book. Anchorage is not one of the markets listed in the Fact Book. You conclude, therefore, that stations located in Anchorage are not subject to any regulatory fees. Moreover, you maintain that, even if a fee is due, it is impossible for Fireweed to determine its market rank pursuant to the Commission's Report and Order. You request that the Commission issue a Declaratory Ruling that Fireweed and other Alaskan stations are not subject to the regulatory fees, or in the alternative, determine what fee should be assessed against Fireweed, and the basis therefor.

We find that Fireweed is subject to regulatory fees payable by stations located in the "remaining markets." As set forth below, consideration of the regulatory fees to be paid by all commercial licensees was specifically included in Section 9(g), the Notice of Proposed Rulemaking, and the Report and Order.

Section 9(g): In Section 9(g), Congress established a sliding scale of regulatory fees for television stations with stations serving larger markets paying larger fees, and those in smaller markets paying less. Section 9(g) specifies fees for Commercial Television Stations in markets 1 through 10, 11 through 25, 26 through 50, 51 through 100, and the remaining markets. Congress did not instruct the Commission on how to determine which stations are in which markets, and the plain reading of Section 9 establishes that Congress, by referring to the remaining markets, included all Commercial Television Stations not included or serving the top one hundred commercial markets.

Mr. Lansman

The Notice of Proposed Rulemaking: The Notice proposed that television licensees would be assessed a regulatory fee based on the ranking of the relevant station market. For FY 1994, the Notice proposed the schedule of markets and fees to be assessed under Section 9. The Commission noted that in determining a station's market rank, it traditionally relied on Arbitron rankings, that Arbitron announced that it will no longer provide rating services, and it asked for comments on what source the Commission should use to determine rankings. See Notice of Proposed Rulemaking, ¶¶ 67-69. Thus, the Commission made clear that it was inquiring into the system to be used to categorize markets for determining the fee to be paid, and its proposed schedule of fees was consistent with Section 9, and included consideration of all Commercial Television Stations.

You contend that the Commission did not intend to include KYES in the Schedule of Fees because it was not included in Table 1 in Appendix C. Table 1, however, was not a definitive statement of the number of licensees, but rather was a compilation from readily available data used to compute the "estimated average regulatory fee" to provide guidance concerning which stations should be authorized to make installment payments. See Notice of Proposed Rulemaking at ¶ 68. To imply that the chart was a definitive and all inclusive statement, addressing which stations would be subject to the regulatory fees, is totally inconsistent with Section 9's plain language that all commercial stations should pay regulatory fees. In this regard, the chart does not attempt to identify specific markets, licensees, or the fee rate category into which they would fall.

The Report and Order: The Report and Order stated that the Commission intended "to use the Bureau's computer data bases [which includes Fireweed] to verify the identity of regulatees subject to regulatory fees. . . ." It further determined that the Commission would use the Arbitron ADI rankings "for determining the relative ranking of television markets." Report and Order at ¶¶ 77-80. Thus, the Arbitron rankings are used to identify the markets and licensees which are subject to rate categories in the top one hundred markets. All other markets and commercial licensees will pay regulatory fees based on their service to the remaining markets.

Fireweed's Regulatory Fees: Since Anchorage is not listed in the Arbitron ratings, you contend that your fee cannot be determined. The Arbitron ratings are used to define only the top one hundred markets. Anchorage is not in the top one hundred markets, and therefore it must necessarily be categorized as belonging within that broad residue labeled as the "remaining markets." Fireweed,

Mr. Lansman

as a VHF commercial licensee not within the top one hundred markets, is therefore subject to the same regulatory fee as all other VHF stations similarly located and falling within the umbrella caption of "remaining markets."[2]

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

---

[2] You note that, in a separate pleading, Fireweed has requested clarification or modification of fees because of its status as a shared channel station. This ruling addresses only the issue of which market rate category is applicable to Fireweed and is not intended to prejudge or otherwise affect Fireweed's arguments which will be addressed in the Commission's reconsideration of the Report and Order.

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

AUG 0 4 1994

Robert S. Koppel, Vice President
IDB WORLDCOM, Inc.
15245 Shady Grove Road
Suite 460
Rockville, Maryland 20850

Dear Mr. Koppel:

This responds to the request of IDB WORLDCOM, Inc. for a refund and waiver of the $10,150 fee payment it had submitted in connection with its application for a non-common carrier submarine cable landing license to cover the installation of fiber optics cable at Puerto Rico that it filed on February 28, 1994. In the alternative, IDB requests a determination of the appropriate fee for the processing of its application.

IDB contends that a non-common carrier submarine cable landing license fee cannot be assessed because the Commission failed to include the fee in its Schedule of Charges as published in the Federal Register and the Code of Federal Regulations. IDB acknowledges, however, that section 8 of the Communications Act, as amended, 47 U.S.C. Section 158, established a revised Schedule of Charges that specified the $10,150 fee for such licenses, and that the fee was referred to in Appendix B of the Commission's implementation Order. Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 55 Fed.Reg. 19148, 19184 (May 8, 1990). Additionally, IDB maintains that the $10,150 license fee includes the cost of processing section 214 cable construction applications, and is thus excessive and bears no relation to the costs of processing a private cable landing license application.

We have addressed and rejected the same arguments that IDB has made in OPTEL Communications, Inc. ("OPTEL"), 7 FCC Rcd 7363 (Man. Dir. 1992), a copy of which is attached. Specifically, we found that the Commission provided adequate notice of the non-common carrier submarine cable landing license fee by publishing the requirement in the guidelines that accompanied the Schedule of Charges, even though the fee was inadvertently omitted from the Schedule of Charges. Id. at 7364. We further found that the fee, as explicitly established by Congress, would not be subject to further revisions or future fee determinations by waivers. Id. at 7364-65. The Commission had emphasized that it was "adopting the

Mr. Koppel

Schedule of Charges exactly as approved by Congress and the President." Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, 55 Fed. Reg. at 19153.

Accordingly, your petition for a waiver and/or determination of a filing fee is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

Attachment

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

29 JUL 1994

OFFICE OF
MANAGING DIRECTOR

David D. Oxenford, Esq.
Fisher Wayland Cooper Leader & Zaragoza
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006-1851

Re: KB Broadcasting, Inc.
New FM Station
Blooming Prairie, Minnesota
Fee Control # 9211028170397003

Dear Mr. Oxenford:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above-referenced submission (§ 1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission had adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

_____ In the case of a broadcast applicant, the application was granted without being designated for hearing (§1.1111(b)(1)).

David D. Oxenford, Esq.

_____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

__X__ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but one application, and that application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
For Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

AUG 3 1994

OFFICE OF
MANAGING DIRECTOR

Ms. Karen E. Slade
c/o KES Communications, Inc.
1148 Citrus Street
Los Angeles, California 90019

Dear Ms. Slade:

This is in further reference to the request for refund of the hearing fee that you submitted on behalf of KES Communications, Inc. ("KES"), an applicant for a new FM station in Waimea, Hawaii. You stated that "after extensive negotiations," a settlement was reached between the parties and granted by the ALJ, thus obviating the need for a hearing. See FCC93M-584 (released September 15, 1993). Therefore, you requested a refund of your hearing fee. Your refund request was granted. See Fee Decisions Public Notice, DA 94-126 (released February 16, 1994).

Section 1.1111(a)(4) of the Commission's rules provides for refund of a hearing fee when a settlement agreement is filed with the presiding judge before the notice of appearance deadline. In the instant case, the hearing designation order was released March 16, 1993, and established April 5, 1993, as the notice of appearance deadline. The settlement agreement therefore was not filed until August 23, 1993, considerably well after the notice of appearance deadline. Under the circumstances, refund of your filing fee was inadvertent and in error.

Based on the foregoing, your request for a filing fee refund should have been denied. Therefore, your letter ruling of December 22, 1993, should be, and is hereby, vacated. As a consequence, you should remit another check , drawn in the amount of $6,760, payable to the U.S. Treasury, within thirty (30) days from the date shown above.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

cc: Thomas Holleran
Cary S. Tepper

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

AUG 3 1994

Cary S. Tepper, Esq.
Meyer, Faller, Weisman
& Rosenberg, P.C.
4400 Jenifer Street, N.W.
Suite 380
Washington, D.C. 20015-2113

Dear Mr. Tepper:

This is in reference to your request for refund of the hearing fee submitted on behalf of Lauryn Broadcasting Corporation ("Lauryn"), an applicant for a new FM station in Beaumont, California. You state that prior to the "commencement of a full hearing" Lauryn voluntarily dismissed its application as part of a settlement with the other competing applicant. You contend that Lauryn is entitled to a refund because it did not avail itself of the Commission's hearing processes.

Section 1.1111(a)(4) of the Commission's rules provides for refund of a hearing fee when a settlement agreement is filed with the presiding judge before the notice of appearance deadline. In the instant case, the hearing designation order was released January 21, 1993, establishing February 10, 1993 as the notice of appearance deadline. The settlement agreement was filed on April 7, 1993. The settlement agreement was filed after the notice of appearance deadline and thus became impermissibly late for purposes of fee refunds. Under the circumstances, refund of the hearing fee is unwarranted.

Based on the foregoing, your request for a filing fee refund is denied.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OFFICE OF
MANAGING DIRECTOR

Stanley S. Neustadt, Esq.
Cohn and Marks
1333 New Hamphshire Avenue, N.W.
Suite 600
Washington, D.C. 20036-1573

Re: WinCom Wisconsin Limited Partnership
New Fm Station
Kaukauna, Wisconsin
Fee Control # 9209118170381002

Dear Mr. Neustadt:

This is in response to your request for refund of the fee submitted in the above-referenced matter.

Your request is granted. We have reviewed the facts surrounding your filing and have concluded that a refund is warranted pursuant to Section 1.1111 of the Commission's rules. 47 C.F.R. §1.1111. The subsection checked below is specifically applicable to your request.

_____ No fee is required for the above-referenced submission (§ 1.1111(a)(1)).

_____ An insufficient fee has been submitted with the application/filing (§1.1111(a)(2)).

_____ The applicant cannot fulfill the prescribed age requirement (§1.1111(a)(4)).

_____ The Commission had adopted a new rule that has nullified the application after its acceptance for filing (§1.1111(a)(4)).

_____ A new law or treaty has rendered useless a grant or other positive disposition of the application (§1.1111(a)(4)).

_____ The application was not timely filed in accordance with the filing window as established by the Commission (§1.1111(a)(6)).

__X__ In the case of a broadcast applicant, an application was granted without being designated for hearing (§1.1111(b)(1)).

Stanley S. Neustadt, Esq.

_____ In the case of a broadcast applicant, the application was dismissed prior to designation for hearing or in the order designating the case for hearing (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the application was dismissed for failure to file a Notice of Appearance (§1.1111(b)(2)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding to file a Notice of Appearance and the application was immediately grantable (§1.1111(b)(3)).

_____ In the case of a broadcast applicant, the applicant was the only applicant in the proceeding who filed a Notice of Appearance and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for the dismissal of all but the above-referenced application, and the application was immediately grantable (§1.1111(b)(4)).

_____ In the case of a broadcast applicant, a settlement agreement filed with the presiding judge by the Notice of Appearance deadline provided for dismissal of all but the above-referenced application and the application was immediately grantable upon deletion of a matter(s) specified in the designation order and requiring resolution (§1.1111(b)(4)).

A check, made payable to the maker of the original check and drawn in the amount of $6,760, will be sent to you at the earliest practicable time. If you have any questions concerning this refund, please contact the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett

Marilyn J. McDermett
Associate Managing Director
for Operations

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

AUG 4 1994

OFFICE OF
MANAGING DIRECTOR

Mr. Dennis James Burnett
Haight, Gardner, Poor & Havens
1300 I Street, N.W.
Washington, D.C. 20005

Dear Mr. Burnett:

This is in response to the request for a determination of the applicable filing fee for a remote sensing satellite system dated May 26, 1994, that you filed on behalf of WorldView Imaging Corporation (WorldView).

You represent that none of the fees, established in the Schedule of Application Fees, apply to a remote sensing satellite system application. You also assert that there are substantive differences in the operating characteristics and licensing policies between WorldView's remote sensing satellite system and the geostationary orbiting and low-earth orbiting satellite systems for which fees are specifically set forth in the Schedule of Application Fees.

WorldView's satellite system is also licensed by the Department of Commerce pursuant to the Land Remote Sensing Policy Act of 1992 (P.L. 102-555 (1992)), 15 U.S.C. § 5601 *et seq.* You believe that WorldView's proposal is unique because its application is the first remote sensing satellite application filed with the Commission. WorldView proposes to transmit data to two or three fixed earth station processing facilities. In contrast, other satellite space stations act as a relay between two or more earth stations. You also state that the Commission's regulatory responsibilities are reduced because of the regulatory involvement of the Department of Commerce which approves the launch, orbit and plans for data transmission, thereby eliminating the Commission's need to consider the design and orbit of the satellite and the applicant's financial qualifications. In sum, you contend that the Commission's coordinating costs for WorldView's frequencies will be minimal, and that there are no fees prescribed for licensing the activities listed for remote sensing satellites.

You request that the Commission establish an appropriate filing fee for WorldView of approximately $10,000 for authority to launch and operate the remote sensing satellite. In the alternative, you request that the Commission waive the filing fee entirely, or allow WorldView to pay the fee in installments extending over a period of 2 years after launch.

Mr. Burnett

Your request for waiver or a reduced filing fee, or in the alternative for leave to make installment payments, will be denied. The Commission "may waive . . . payment of charges in any specific instance for good cause shown, where such action would promote the public interest. 47 U.S.C. § 158(d)(2); see also 47 C.F.R. § 1.115(a). However, Congress specifically admonished the Commission to construe its waiver authority "narrowly," and we cannot find sufficient justification to grant WorldView a waiver or reduction of the filing fee. See Conference Report to accompany H.R. No. 453, 99th Cong.

The Schedule of Application Fees is intended to recover the costs of the Commission's licensing service. The involvement of the Department of Commerce in the licensing process is supplemental to, and does not replace, the Commission's licensing procedure. The Commission must, as with other space station facilities, determine whether the proposed operations are electromagnetically compatible with other operations in the band and whether any other operational or technical requirements are warranted. Further, WorldView's remote sensing satellite is a Low-Earth Orbit Satellite and must be coordinated internationally in the same manner as other Low-Earth Orbit Satellites. Moreover, although WorldView's system is intended to fulfill a different purpose than most other communications satellites, satellites provide a wide variety of common carrier and non-common carrier voice and data services and the Commission's costs in licensing those facilities bear little, if any, relationship to the types of services being provided.

The application filing fees were established by Congress. 47 U.S.C. § 8. Congress also authorized the licensing of private remote earth sensing systems and it specifically allocated to the Commission responsibility for licensing remote earth sensing systems pursuant to 47 U.S.C. § 151 *et seq.*; 15 U.S.C. §§ 5621 and 5656(a). It did not, however, modify 47 U.S.C. § 8 to authorize remote earth sensing facilities to pay a lower fee than other Low-Earth Orbit Satellite Stations. Thus, WorldView is required to pay the same filing fee as all other Low-Earth Orbit Satellite Stations. Finally, although you request authority for WorldView to make installment payments, you have not made a showing of financial hardship or other relevant circumstances which would warrant authorizing WorldView to make installment payments or to be treated differently from other Low-Earth Orbit Satellite Stations.

Accordingly, WorldView is required to pay a filing fee of $6,000 for the construction and $210,000 for launch and operation of Low-Earth Orbit Satellite facilities, and your request for other relief is denied.

Mr. Burnett

If you have any questions concerning the payment of these fees, please call the Chief, Fee Section at (202) 632-0241.

Sincerely,

Marilyn J. McDermett
Associate Managing Director
for Operations

DA 94-679

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
National Exchange Carrier Association, Inc.	)	
	)	Transmittal No. 610
Revisions to Tariff F.C.C. No. 5	)	
	)	

ORDER

Adopted: June 20, 1994 ; Released: June 22, 1994

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. On May 9, 1994, the National Exchange Carrier Association, Inc. (NECA) filed Transmittal No. 610, to revise its tariff for the provision of billing name and address (BNA) information. MCI Telecommunications Corporation (MCI) filed a petition to reject Transmittal 610 on May 24, 1994. NECA and PRTC filed separate oppositions to MCI's petition on June 6, 1994.

2. The Commission directed NECA and other local exchange carriers (LECs) to file BNA tariffs in the BNA Order, and adopted a number of provisions to protect the privacy interests of end users.[1] Some of these privacy protections were modified in the Second BNA Reconsideration Order.[2] Specifically, LECs were required to seek authorization for BNA disclosure from subscribers with unlisted or nonpublished telephone numbers,[3] but they were permitted to presume that a subscriber consents to such disclosure unless it makes an affirmative request that its BNA not be disclosed.[4] In Transmittal 610, NECA proposes to revise its tariff to permit Puerto Rico Telephone Company (PRTC) to withhold disclosure of BNA associated with subscribers with unlisted or nonpublished unless those subscribers provide positive authorization for disclosure. According to NECA, PRTC believes that a negative authorization

---

[1] Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, Second Report and Order, 8 FCC Rcd 4478 (1993) (BNA Order).

[2] Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115, 8 FCC Rcd 8798 (1993) (Second BNA Reconsideration Order), recon. pending.

[3] BNA Order, 8 FCC Rcd at 4486-87 (para. 40).

[4] Second BNA Reconsideration Order, 8 FCC Rcd at 8810 (para. 68).

used for other NECA member LECs would place PRTC in violation of the Puerto Rico Constitution.[5] Transmittal 610 is scheduled to take effect on June 23, 1994, on 45 days' notice.

3. MCI contends that the Commission, not Puerto Rico, has jurisdiction over interstate communications services.[6] MCI also maintains that Transmittal 610 would violate Section 64.1201(e)(2)(ii) of the Commission's Rules, 47 C.F.R. § 64.1201(e)(2)(ii), which, according to MCI, requires LECs to presume that their subscribers consent to BNA disclosure unless they affirmatively request that their BNA not be disclosed.[7] According to MCI, Transmittal 610 must be rejected in the absence of a waiver of Section 64.1201(e)(2)(ii).[8] Finally, MCI is concerned that NECA's tariff revision would limit the availability of BNA information that MCI needs for billing purposes.[9]

4. NECA and PRTC note that the rules originally adopted in the BNA Order required LECs to obtain positive authorization for BNA disclosure.[10] NECA and PRTC also argue that, when the Commission revised its rules to permit negative authorization, it did not find the original standard illegal or prohibit LECs from taking actions to protect end user privacy over and above the rule requirements.[11] According to NECA, its proposed tariff does not require a waiver of Section 64.1201(e)(2) of the Commission's Rules.[12] NECA notes that PRTC's subscriber notification will mirror the notification of other NECA members, and asserts that using a positive authorization does not harm any interested party.[13]

5. We have reviewed the BNA tariff revision filed by NECA, as well as all associated pleadings. We conclude that NECA's tariff is not so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.[14]

---

[5] NECA Transmittal No. 610, Transmittal Letter, at 1. See also PRTC Opposition at 2 n.2, quoting Constitution of Puerto Rico, Article II, Section 8. PRTC asserts that the Courts in Puerto Rico have found that the right to privacy in the Puerto Rico Constitution outranks the right to free speech. Id., citing PRTC v. Martinez, 114 D.P.R. 328 (1983); Colon v. Romero-Barcelo, 112 D.P.R. 573 (1982).

[6] MCI Petition at 2.

[7] Id. at 3.

[8] Id.

[9] Id. at 3 n.6.

[10] NECA Opposition at 3-4, PRTC Opposition at 3, citing BNA Order, 8 FCC Rcd at 4486-87.

[11] NECA Opposition at 4; PRTC Opposition at 3-5.

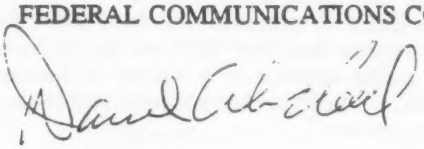
[12] NECA Opposition at 4. See also PRTC Opposition at 5 (Transmittal 610 is not prima facie unlawful).

[13] Id. at 5.

[14] We need not address at this time the issue of whether NECA and PRTC have properly interpreted the Constitution or Puerto Rico.

6. Accordingly, IT IS ORDERED that the petition for rejection filed by MCI Telecommunications Corporation, against the transmittal captioned above, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



David A. Nall
Acting Chief, Tariff Division
Common Carrier Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 94-58
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation	)	CC Docket No. 92-256

Report and Order

Adopted: March 8, 1994 Released: April 4, 1994

By the Commission:

Table of Contents

Topic	Paragraph No.
I. Introduction	
A. Summary	1
B. Background	2
II. Application of ONA Requirements and Nondiscrimination Safeguards to GTE	5
III. Specific ONA Requirements and Nondiscrimination Safeguards for GTE	25
A. ONA Plan	25
B. ONA Requirements	27
1. Initial ONA Offerings and Deployment Projection Reports	27
2. Annual and Semiannual ONA Reports	33
C. Nondiscrimination Safeguards	36
1. CPNI	39

2. OSS 46

3. Network Information Disclosure Rules 50

4. Nondiscrimination in Installation and Maintenance 54

IV. Implementation 60

V. Preemption 65

VI. Regulatory Flexibility Act 69

VII. Ordering Clauses 70

Appendix A

I. Introduction

A. Summary

1. On December 2, 1992, the Commission released a Notice of Proposed Rulemaking proposing to apply to GTE Corporation (GTE) the same regulatory framework of Open Network Architecture (ONA) and nondiscrimination safeguards that apply to the Bell Operating Companies (BOCs).[1] In this Order, we apply the ONA requirements and nondiscrimination safeguards to GTE. These requirements for GTE will provide enhanced service providers (ESPs) with greater access to unbundled services, thus facilitating the provision of additional information age services and greater price competition to consumers. We require that GTE file an ONA plan nine months from release of this Order, file federal and state ONA tariffs three months later,[2] and implement ONA requirements and nondiscrimination safeguards fifteen months after release of this Order.

B. Background

2. In the Computer III and ONA proceedings, we established a comprehensive regulatory framework of nonstructural safeguards, including ONA requirements and nondiscrimination safeguards, to govern the BOCs' participation in the enhanced services marketplace.[3] In

---

[1] In the Matter of Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation, Notice of Proposed Rulemaking, CC Docket No. 92-256, 7 FCC Rcd 8664 (1992) (Notice).

[2] The federal tariffs are to be scheduled to become effective on three months public notice.

[3] Amendment of Section 64.702 of the Commission's Rules and Regulations, Phase I, 104 FCC 2d 958 (1986) (Phase I Order), recon., 2 FCC Rcd 3035 (1987) (Phase I Reconsideration Order), further recon.,

order to provide network-based opportunities for competing ESPs, we imposed on the BOCs Comparably Efficient Interconnection (CEI) and ONA requirements as conditions for providing enhanced services on an integrated basis.

3. Our ONA regime generates significant public interest benefits in two major respects. By imposing special obligations on the BOCs to respond to ESP needs by unbundling existing basic services and providing new basic services, ONA increases opportunities for all ESPs to develop new offerings and expands their markets for services through efficient use of the regulated local exchange network. In particular, ONA ensures that ESPs and others are able to purchase only the functionalities that they need and obtain specific basic network functions necessary to provide their services.[4] Our ONA requirements and nondiscrimination safeguards also effectively guard against discrimination by the carrier in its provision of basic services to ESPs.[5] These protections facilitate use of the network in the

---

3 FCC Rcd 1135 (1988) (Phase I Further Reconsideration Order), second further recon., 4 FCC Rcd 5927 (1989) (Phase I Second Further Reconsideration, Phase I Order and Phase I Reconsideration Order vacated, California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Phase II, 2 FCC Rcd 3072 (1987) (Phase II Order), recon., 3 FCC Rcd 1150 (1988) (Phase II Reconsideration Order), further recon., 4 FCC Rcd 5927 (1988) (Phase II Further Reconsideration Order), Phase II Order vacated, California v. FCC, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceeding, 5 FCC Rcd 7719 (1990) (ONA Remand Order), recon., 7 FCC Rcd 909 (1992), pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993); Computer III Remand Proceeding: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991) (BOC Safeguards Order), pets. for recon. pending, pets. for rev. pending, California v. FCC, No. 92-70083 (9th Cir. filed Feb. 14, 1992); Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1 (1988) (BOC ONA Order), recon., 5 FCC Rcd 3084 (1990) (BOC ONA Reconsideration Order), 5 FCC Rcd 3103 (1990) (BOC ONA Amendment Order), Erratum, 5 FCC Rcd 4045, pets. for review denied, California v. FCC, 4 F.3d 1505 (9th Cir. 1993), recon., 8 FCC Rcd 97 (1993) (BOC ONA Amendment Reconsideration Order), 6 FCC Rcd 7646 (1991) (BOC ONA Further Amendment Order), 8 FCC Rcd 2606 (1993), (BOC ONA Second Further Amendment Order), pet. for review denied MCI Telecommunications Corp. v. FCC, No. 92-70189, slip op. (9th Cir. Sept. 23, 1993).

[4] Under the ONA model, ESPs obtain access to various unbundled ONA services, termed Basic Service Elements (BSEs), through access links described as Basic Serving Arrangements (BSAs). Other ONA elements include Complementary Network Services (CNSs), which are unbundled basic service features that an end user may obtain from a BOC in order to receive or use an enhanced service, and Ancillary Network Services (ANSs), which are non-Title II services, such as billing and collection that may be useful to ESPs. See BOC ONA Amendment Order, 5 FCC Rcd at 3104.

[5] Phase I Order, 104 FCC 2d at 1065-66.

provision of enhanced services, thereby increasing the availability of competitively provided enhanced services to consumers.

4. Although we initially did not require local telephone companies other than the BOCs to comply with ONA requirements and nondiscrimination safeguards, we stated that we would revisit the issue of applying these requirements to GTE once initial ONA implementation by the BOCs was completed.[6] After gaining substantial experience with the BOCs, we began this proceeding to seek comment on our proposal to apply to GTE the ONA requirements and nondiscrimination safeguards that govern the BOCs' participation in the enhanced services market.[7]

II. Application of ONA Requirements and Nondiscrimination Safeguards to GTE

5. Notice/Background. In the Notice, we tentatively concluded that GTE's merger with Contel Corporation (Contel) had significantly expanded the scope of GTE's operations and increased the benefits that GTE would bring to its customers by conforming to BOC ONA requirements. We tentatively concluded that GTE's ability to participate in the enhanced services market has increased, as well as its ability and incentive to discriminate against competitors. We also tentatively concluded that the scope and strength of GTE's operations will give GTE the ability to comply with the ONA requirements and the nondiscrimination safeguards. In addition, we concluded that the substantial experience gained by implementing ONA for the BOCs would enable us to streamline and speed the implementation of ONA for GTE, reducing the costs involved. Accordingly, we tentatively concluded that, in light of its size and resources, the benefits that could be achieved from GTE implementing ONA requirements and nondiscrimination safeguards now outweigh the fact that it is geographically dispersed.[8]

---

[6] Id. at 1027-8. Each of the seven BOCs has implemented ONA, and has been granted structural relief by the Commission.

[7] We did not need to propose any change to the cost accounting safeguards applicable to GTE because, as a Tier 1 local exchange carrier (LEC), GTE is already fully subject to the same requirements as the BOCs. Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities and Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to provide for Nonregulated Activities and to Provide for Transactions Between Telephone Companies and Their Affiliates, Report and Order, 2 FCC Rcd 1298, 1304-05 (1987) (Joint Cost Order), recon. 2 FCC Rcd 6283 (1987), further recon., 3 FCC Rcd 6701 (1988), aff'd sub nom., Southwestern Bell v. FCC, 896 F. 2d 1378 (D.C. Cir. 1990), BOC Safeguards Order, 6 FCC Rcd 7571 (1991). We do not address at this time the application of ONA and nondiscrimination safeguards to independent telephone companies other than GTE.

[8] In reaching this tentative conclusion, the Notice specifically considered GTE arguments that the Contel merger made the company more rural and dispersed and, therefore, a less appropriate subject for ONA

We also sought comment on whether our ONA requirements should be modified to make them less onerous to reflect GTE's many small rural local exchange operations.[9] We sought comment on this analysis, and ten parties filed comments and six parties filed reply comments.[10]

6. Positions of the Parties. As it argued before we adopted the Notice, GTE contends that today the case for applying ONA requirements to GTE is weaker than it was in the past. GTE cites the occasions in the past when the Commission determined that the more rural and geographically dispersed characteristics of GTE and the circumstances affecting its operations justified treatment different from that accorded the BOCs. GTE argues that factors related to its merger with Contel provide an even stronger justification for treating GTE and the BOCs differently. In particular, GTE argues that, since its merger with Contel, its operations are more rural and geographically dispersed, covering over forty states and twice GTE's previous service territory.[11] GTE contends that the nationwide distribution of its service areas in many noncontiguous locations prevents GTE from exercising monopoly control to the same extent as the BOCs, and gives GTE less ability to discriminate than the BOCs.[12] GTE argues that the geographically dispersed nature of its operations discourages, if not prevents, it from using its market position for anticompetitive purposes. In addition, GTE contends that its service areas tend to be surrounded by the BOCs, which provide competitive pressures.[13] GTE further states that it is subject to regulation by forty state commissions, and that this heavy regulatory burden, coupled with the prospect of additional Commission requirements, places GTE at a distinct disadvantage compared to its competitors.[14]

7. GTE contends that applying ONA requirements only to selected portions of its territory is unwarranted and would provide

---

requirements. Notice, 7 FCC Rcd at 8667, paras. 10-11.

[9] Id. at para. 12.

[10] A list of parties filing comments and replies is attached as Appendix A.

[11] GTE Comments at 17-23.

[12] Id. GTE also states that its offices tend to be smaller that those of the BOCs (fewer access lines per exchange), less densely populated (fewer access lines per square mile), and contain a smaller percentage of business customers than BOC service areas. GTE notes that it has a presence in only two of the top 50 markets (MSAs). Id. at 23-7.

[13] Id. at 24-5.

[14] In particular, GTE compares its state regulatory burden with that of US West that operates in fourteen states and Pacific that is subject to regulation in only two state jurisdictions. Id. at 28-30.

only relatively small savings because the costs of compliance, such as systems development costs, are largely insensitive to volume.[15] For instance, GTE argues that the costs of ONA compliance for their service areas in ten states would be virtually the same as for their service areas in all forty states.[16] GTE further contends that only three GTE service areas could be said to resemble BOC service areas: west-central Florida, Hawaii, and portions of California. GTE argues that mandatory ONA requirements and nondiscrimination safeguards cannot be justified for these areas alone,[17] but that applying ONA requirements to these three locations would generate 40% of the volume-sensitive costs of compliance and nearly 100% of systems development costs.

8. GTE also contends that there is no significant benefit to be gained by imposing the BOC ONA requirements and nondiscrimination safeguards because GTE is already achieving many of these goals on a voluntary basis, and its customers are now receiving the associated benefits.[18] According to GTE, it must offer competitively priced, high value services to customers to compete in today's marketplace.[19] GTE also cites the scarcity of complaints filed with the Commission as an indicator that it has not engaged in discriminatory practices against ESPs.

9. In light of the factors discussed above, GTE argues that the costs associated with implementing ONA requirements and the nondiscrimination safeguards outweigh the benefits.[20] GTE argues that while we compared the "benefits" with the "costs" associated with imposing restrictions in the past, the Commission did not consider the costs of imposing additional regulation on GTE in the Notice. Instead, GTE contends that the Notice merely focuses on the increased number of

---

[15] Id. at 72-3.

[16] GTE Reply Comments at 4.

[17] GTE Comments at 71-3.

[18] Id. at 41-5.

[19] Id. at 14.

[20] As it argued before we issued the Notice, GTE initially estimated in this proceeding that the cost of implementing these requirements would be nearly $20 million in the first year. It stated that the costs would be primarily for systems and hardware costs associated with access to GTE's Operations Support Systems. See Notice, 7 FCC Rcd at 8667, n. 28. GTE Comments at 4. Based on the clarification in the BOC ONA Amendment Reconsideration Order, GTE now estimates that the cost for ONA implementation will be approximately $3.7 million for the first year and $7.8 million and $14.6 million for the next five and ten years respectively. See Ex Parte Letter from Edwin J. Shimizu, Director - Regulatory Matters, GTE, to Claudia Pabo, Policy and Program Planning Division, Common Carrier Bureau, FCC, October 21, 1993.

subscribers to conclude that the benefits of ONA for GTE have increased. GTE argues that while the benefits may have increased, so have the costs, and that they continue to outweigh the benefits. In sum, GTE argues that our decision must reflect an understanding that: its market position is far less favorable than that of the BOCs, the proportionate cost impact on GTE would be far greater than it was on the BOCs, and GTE's ability to engage in anticompetitive activity is far less.[21] GTE also argues that these requirements would result in a dramatically increased regulatory burden in today's environment of reduced regulation.[22] Sprint joins GTE in arguing that the application of ONA requirements to GTE's service areas is not in the public interest.[23]

10. Eight parties, including an interexchange carrier, ESP, end user, and a LEC, support imposing ONA requirements on GTE.[24] Bell Atlantic states that the federal appellate courts have rejected previous attempts to distinguish GTE's service areas from those of the BOCs.[25] ITAA argues that the Commission has never really provided a rational basis for exempting GTE from the separate subsidiary requirements of Computer II. ITAA further notes that the US Court of Appeals for the Ninth Circuit stated that there has been "no coherence in the Commission's policy shifts in deciding which carriers to subject to separation requirements."[26]

11. Several of the parties argue that GTE resembles a BOC despite the geographic dispersion of its service areas. Thus, Bell Atlantic, ITAA, Hawaii, and GSA argue that it is appropriate to eliminate any regulatory distinction between GTE and the BOCs.[27] Hawaii argues that GTE is equivalent in size and financial strength to a BOC

---

[21] GTE Comments at 39.

[22] Id. at 11-5. GTE further argues that these requirements should not be imposed because the exchange carrier bottleneck is a diminished concern in today's competitive environment.

[23] Sprint argues that ONA, in its current form, generates significant costs but few, if any, benefits. Sprint Comments at 5.

[24] ATSI Comments at 1; Bell Atlantic Comments at 1; GSA Comments at 3; Hawaii Comments at 1; ITN Comments at 10; ITAA Comments at 2-3; MCI Comments at 1; and NAB Comments at 7. Several parties argue that, although ONA is not what they had originally envisioned, it is the only protection against discrimination that they have. ITAA Comments at 5-6; ATSI Comments at 1; and MCI Comments at 1.

[25] Bell Atlantic Comments at 1-3.

[26] ITAA Comments at 4.

[27] Bell Atlantic Comments at 1-3; ITAA Comments at 5; Hawaii Comments at 2; GSA Comments at 4.

for all relevant purposes.[28] Hawaii contends that GTE enjoys the same monopoly control over the local exchange as the BOCs. Hawaii also argues that GTE has a sufficient presence in urban areas to warrant the imposition of ONA requirements.[29] ATSI and Hawaii argue that GTE's average overall line density is higher than that of US West.[30] Hawaii also argues that GTE is financially capable of complying with all the ONA requirements and nondiscrimination safeguards.[31] ITN states that the Commission was probably correct in its initial conclusion that the application of ONA requirements and nondiscrimination safeguards to GTE would yield fewer benefits than their application to the BOCs. ITN contends, however, that emerging technologies, particularly Signaling System Seven (SS7), Integrated Services Digital Network (ISDN), and Intelligent Network (IN), have substantially altered this analysis.[32] MCI notes that the Commission did not consider geographic dispersion of service areas to be a sufficient reason to justify exempting GTE from the Commission's expanded interconnection requirements.[33] MCI argues that GTE is now too large in size and scope to remain outside the coverage of ONA.[34] MCI further argues that ONA provides enough flexibility in the degree of uniformity required to account for the geographic dispersion of GTE's territory.[35] Bell Atlantic contends that if the Commission imposes different requirements based upon the density

---

[28] Hawaii Reply Comments at 5-6.

[29] Hawaii Comments at 6 and Appendix B. Hawaii notes that the Commission imposed ONA requirements on small urban areas such as Burlington, Vermont which is served by the BOCs. Id.

[30] ATSI Comments at 14; Hawaii Comments at 5.

[31] Hawaii Comments at 3-4. Hawaii argues that additional revenues may be generated by the growth in GTE's basic services arising from the increased purchases by ESPs under ONA. Hawaii Reply Comments at 5. GTE disputes Hawaii's conclusion that it would realize increased revenues from additional business access, stating that GTE has already implemented an equivalent of ONA, and any increases in traffic would already have occurred. GTE Reply Comments at 3-4. In its reply comments, Hawaii disagrees with GTE's arguments regarding the costs of complying with nondiscrimination rules, arguing that GTE fails to provide support materials for its estimate of the cost of implementing ONA. Hawaii further states that there are benefits to be gained from ONA. Hawaii Reply Comments at 3-4.

[32] ITN Comments at 9.

[33] MCI Reply Comments at 4-5.

[34] MCI Comments at 5.

[35] Id. at 1.

of the populations various carriers serve, it should apply the same rules to the urban and rural areas of both GTE and the BOCs.[36]

12. Several parties supporting the application of ONA requirements to GTE argue that ONA should be applied because GTE has the ability to discriminate.[37] ITAA and ITN argue that GTE is in a better position to discriminate now than the BOCs.[38] As evidence of GTE's ability to discriminate, ITN cites the nationwide character of GTE's facilities and operations, GTE's recent and ongoing efforts to enter the interexchange business, and the absence of competitive access providers (CAPs) due to GTE's less urban operations.[39] MCI argues that GTE's nationwide scope and relative freedom from competition create opportunities for GTE to discriminate against ESPs and other customers.[40] Similarly, the NAB argues that GTE has an incentive to discriminate against competing ESPs and information services providers because unlike the BOCs, who were barred from competing in this market for a number of years by the Modified Final Judgment (MFJ), GTE is already active in the enhanced services area.[41] GSA argues that the growth of ESP competition increases, rather than diminishes, the need for an ONA tariff and service framework in GTE's operating areas. GSA

---

[36] Bell Atlantic Comments at 1-2.

[37] Hawaii Comments at 1; MCI Reply Comments at 3, ITN Comments at 10; and ITAA Comments at 2. Bell Atlantic states that our disparate treatment of the BOCs and GTE appears to have encouraged proposals in Congress to curtail the ability of the BOCs, but not GTE, to provide new information services. Bell Atlantic states that we should not encourage this unjustified discrimination by continuing to treat comparable companies differently. Bell Atlantic Comments at 2-3.

[38] ITAA Comments at 5; ITN Comments at ii. ATSI claims that there are several instances in which GTE has advantageously used its position as both a monopoly provider of basic services and as a competitor in the voice messaging marketplace. ATSI Comments at 11. GTE denies anticompetitive activity in the instances cited by ATSI and states that in one instance the Common Carrier Bureau declined to pursue the matter further, and in another instance, to avoid customer confusion GTE established a separate notification process to inform ESPs of available services. GTE Reply Comments at 5-11.

[39] ITN Comments at 8-12. ITN also argues that GTE's largely suburban and rural character makes cross-subsidization easier and more likely. Id.

[40] MCI Reply Comments at 3.

[41] NAB Comments at 3, 5.

further argues that without ONA, emerging ESPs will be hindered, if not foreclosed, from entering markets served by GTE.[42]

13. A number of commenters oppose restricting application of ONA requirements and nondiscrimination safeguards to select portions of GTE's dispersed territory.[43] ITAA argues that the small, rural nature of some of GTE's local exchange operations does not justify relaxing ONA requirements.[44] ITN argues that, if GTE is providing its own enhanced services using services, facilities, or interconnections in a particular area, then there is no justification for GTE not to provide these same services, facilities, or interconnections to other ESPs on the same terms and conditions.[45]

14. The majority of parties also support mandatory application of the BOC requirements, rather than permitting GTE to continue with its program of voluntarily implementing ONA requirements and nondiscrimination type safeguards.[46] ITAA argues that since the Computer III safeguards have been embraced by the BOCs, they cannot be deemed unduly onerous for an organization of GTE's size and resources.[47]

15. GTE contends that it achieves the goals of CEI and ONA to the extent possible and without generating substantial and unnecessary costs that will either be recovered from the ESP customer base or will prove unrecoverable.[48] In its reply, GTE argues that no

---

[42] GSA Reply Comments at 3.

[43] Hawaii Comments at 2; ATSI Comments at 13; and MCI Comments at 1.

[44] ITAA Comments at 7.

[45] ITN Comments at 12.

[46] GSA Comments at 5; Hawaii Comments at 2-3; ITAA Comments at 3-7; and MCI Reply Comments at 5-6. ITN also contends that transport elements should be provided on an unbundled basis in order to ensure that ESPs and others using network services are not required to purchase or cross-subsidize network elements they do not use. ITN Comments at 13. We decline to address ITN's argument, which is outside the scope of this proceeding.

[47] ITAA Comments at 8. ITAA states that the BOCs are now vigorously defending these safeguards before the U.S. Court of Appeals for the Ninth Circuit. Id. See California v. FCC, 4 F.3d 1505 (9th Cir. 1993).

[48] GTE describes its voluntary ONA measures and argues that they replicate the safeguards implemented by the BOCs. GTE Comments at 42, Appendix J.

commenter describes any ONA/CEI benefit that is not currently being provided by GTE.[49]

16. Discussion. We conclude that we should no longer exempt GTE from complying with ONA requirements and nondiscrimination safeguards. In Computer III, the Commission initially applied ONA requirements and nondiscrimination safeguards to the seven BOCs. At the same time, we concluded that ONA should not apply to GTE because of its more rural and dispersed service areas, although we recognized that it was as large as some of the BOCs. We stated, however, that we would revisit this decision once the BOCs had implemented ONA.[50] Thus, while we believed that the nature of GTE's service territory justified implementing ONA and the nondiscrimination safeguards for the BOCs first because of the greater danger of discrimination and therefore greater potential benefits of these protective measures, we clearly never intended this analysis to bar eventual application of ONA requirements and nondiscrimination safeguards to GTE. When this Commission initiated ONA in 1986, we also emphasized that ONA was an evolutionary program whose specific requirements would be defined and implemented over time through a step-by-step process.[51]

17. Now that the BOCs have implemented ONA and the Commission has lifted the structural separation requirement from all of the BOCs, we believe that it is appropriate to move forward by extending ONA requirements and nondiscrimination safeguards to GTE. We believe that the public interest benefits of applying these measures to GTE amply justify our taking the next logical step toward an overall environment that will foster a fully competitive market for the provision of enhanced services to the American public. The BOC provision of services pursuant to these requirements has resulted in greater access by ESPs to unbundled services that ESPs can use to provide enhanced services to customers. These requirements will extend greater access to the largest non-BOC local telephone company, thus facilitating the provision of additional information age services and greater price competition to consumers. These factors will foster economic growth. Insofar as our conclusions in this proceeding are different from our prior analysis of GTE's operations, we believe that they reflect both our experience with ONA requirements and nondiscrimination safeguards obtained after that earlier analysis, and a more current record developed in proceedings focusing exclusively on ONA for GTE that incorporates that experience.

18. Based on the record in this proceeding, we conclude that the benefits of applying ONA requirements and nondiscrimination

---

[49] GTE Comments at 41-2, Appendix J; GTE Reply Comments at 19-20.

[50] Phase II Order, 2 FCC Rcd at 3073, 3101, para. 201.

[51] Phase I Order, 104 FCC 2d at 1064, para. 213; BOC ONA Order, 4 FCC Rcd at 12, n. 12.

safeguards to GTE now substantially outweigh the costs involved.[52] GTE is a very large company, with several major service areas that resemble BOC territories. We believe that consumers in these areas will benefit substantially from an environment that fosters the competitive provision of enhanced services. The costs that GTE cites for implementation of these safeguards are quite modest, and, by GTE's own admission, are largely volume insensitive, i.e, they do not increase substantially because of inclusion of GTE's smaller, rural service areas.

19. At the outset, we note that GTE is substantially similar to the BOCs in overall size. When compared to the BOCs, GTE ranks second behind BellSouth in total operating revenue, total gross plant, and the number of employees.[53] While GTE has many service areas that are smaller and more rural than those of the BOCs, it has more working loops than Southwestern Bell even if study areas with less than 200,000 working loops are excluded.[54]

20. In addition, GTE serves a number of major urban areas or large geographically contiguous regions in Florida, California, Hawaii, and Texas that resemble BOC service areas. In fact, GTE has 3.4 million working loops in California alone. Moreover, GTE has nine study areas with more than 500,000 working loops.[55] In these areas, GTE's size and large number of customers give it substantial ability and incentive to discriminate against competitors in the enhanced services market. GTE argues that we should not be concerned about the potential for it to discriminate against enhanced service providers

---

[52] Sprint argues that if ONA is extended to GTE, the Commission should reconsider its earlier decisions in CC Docket 89-79 to allow GTE and the BOCs to continue to offer packaged feature group arrangements, and allow ESPs to obtain interstate BSA and BSEs at economical rates. Sprint Comments at 4-6. We decline to address Sprint's request that we reconsider the decision in CC Docket 89-79 as it raises matters beyond the scope of this proceeding.

[53] USTA Holding Company Report (1992). See Notice, 8 FCC Rcd at 8667, para. 8. GTE ranks fourth in the number of access lines, behind Bell Atlantic Corporation, BellSouth Corporation, and Ameritech. See USTA Holding Company Report (1992). The recent merger with Contel added to GTE approximately $3.4 billion in total revenue, 2.7 million additional access lines, and 1,700 local exchanges, placing GTE in the position of one of the largest local exchange carriers in the United States by many measures.

[54] Separations data for 1992 show that Wyoming is the smallest full size BOC study area with 228,000 working local loops. Even when GTE study areas with less than 200,000 working loops are excluded, GTE has 12,860,000 working loops compared to Southwestern Bell with 12,747,000 working loops.

[55] This is based on 1992 separations data.

for a number of reasons. We do not find these contentions persuasive.[56]

21. We believe that consumers in these large GTE service areas would benefit substantially from an environment that fosters the competitive provision of enhanced services. The ONA requirements and nondiscrimination safeguards ensure that non-local exchange carrier (LEC) ESPs can use the local network efficiently, purchasing only the functionalities that they need. ONA also ensures that the LECs will make available the functionalities that their competitors need. The nondiscrimination safeguards ensure that the LECs do not favor their own enhanced service providers in the provision of basic network services. These protections erect a necessary framework for the development of competitive enhanced services. Based on our experience with competition in other markets, we believe that competition in the enhanced services market will spur the development of new offerings and lead to lower rates.

22. GTE's primary argument against the Commission's imposing ONA requirements and nondiscrimination safeguards on it appears to be the costs of implementation. The implementation costs cited by GTE are relatively minor, however. GTE originally claimed $20 million in first year implementation costs, with $16 million of this related to Operations Support Systems (OSS)[57] and has since reduced its estimated cost for first year implementation to $3.7 million,[58] in light

---

[56] For example, the fact that GTE is subject to regulation in forty states does not distinguish it from the BOCs, which are also subject to regulation in each state in which they have significant operations. Moreover, state regulators do not have authority to require compliance with ONA requirements and nondiscrimination safeguards for the provision of interstate basic services. Nor do we believe that the development of access competition or the presence of BOC operations in proximity to GTE service areas sufficiently alleviates the potential for discrimination. In fact, because of the less urban nature of its service areas GTE may face less competitive pressures from competitive access providers than certain of the BOCs. While the Commission is moving to reduce regulation when possible, we cannot relax measures such as ONA requirements and the nondiscrimination safeguards at present without threatening effective enhanced services competition.

[57] Examples of OSS services are service order entry and status; trouble reporting and status; diagnostics, monitoring, testing, and network reconfiguration; and traffic data collection. These four OSS services are defined as ONA services. See BOC ONA Second Further Amendment Order, 8 FCC Rcd 2606, 2611 at n. 64.

[58] See supra n. 20. By contrast, as of year end 1992, GTE had gross revenues of $12.2 billion for its domestic operation. See USTA Holding Company Report, (1993 edition). GTE's 1992 gross revenues for its domestic and international operations combined were $19.9 billion. See FCC Common Carrier Statistics (1993).

of the Commission's BOC ONA Amendment Reconsideration Order[59] clarifying our OSS requirements.[60] We are now able to use the substantial experience we have gained in implementing ONA for the BOCs to streamline procedures and reduce regulatory costs for GTE. Because of this experience, GTE's costs of complying with ONA will be less than they would have been had we applied ONA to GTE at the outset of the ONA process.

23. In addition, the costs of implementing ONA requirements and the nondiscrimination safeguards are not greatly affected by inclusion of GTE's more dispersed, rural service areas. For the most part, the implementation costs cited by GTE are fixed costs related to modifying centralized systems. These costs are largely unaffected by inclusion of GTE's smaller service areas.[61] As a result, in balancing the costs and benefits of applying ONA requirements to GTE today, we accord less weight to the dispersed nature of GTE's service areas than we did when we first considered application of these safeguards to GTE in the Computer III proceeding.[62] In addition, the ONA framework permits some variation in the number and nature of ONA services based on demand in different areas. This will allow GTE some flexibility to tailor its ONA offerings to the demand for them in its different service areas.

24. We do not believe that GTE's voluntary ONA measures should exempt it from mandatory compliance with ONA requirements and nondiscrimination safeguards. GTE's voluntary ONA requirements and nondiscrimination measures, while commendable, fall well short of the BOC standards.[63] In developing the BOC requirements, we conducted

---

[59] 8 FCC Rcd 97 (1993).

[60] See generally, Letter from Edwin J. Shimizu, Director--Regulatory Matters, GTE, to William F. Caton, Acting Secretary, FCC, dated October 21, 1993 (GTE October 14, 1993 Ex Parte Letter).

[61] GTE states that the costs of implementing ONA are largely non-volume sensitive and that excluding smaller study areas will result in limited savings. GTE states that virtually all the start-up costs associated with implementing ONA and the nondiscrimination safeguards would be incurred whether they are applied to GTE operations in one state, ten states, or forty states. GTE Reply Comments at 4; GTE October 21, 1993 Ex Parte Letter.

[62] Thus, we do not find that the Contel merger (which added approximately 20% more access lines, but nearly doubled the total GTE service territory) justifies continued exemption of GTE from these safeguards. GTE Comments at 15-7.

[63] GTE's voluntary network disclosure and CPNI programs lack certain important elements contained in the BOC requirements. See infra. paras. 45 and 53. In addition, GTE's voluntary program does not include disclosure of important information that the BOCs must report. See infra. paras. 54, 55 and 56. We discuss the merits of

extensive proceedings to determine the safeguards necessary for a competitive enhanced service market.[64] Given the major differences between the safeguards GTE has implemented voluntarily and the measures that we developed after extensive proceedings for the BOCs, we do not believe that GTE's voluntary safeguards can achieve our goals.[65] In sum, we agree with the majority of commenters that GTE should be required to implement ONA and comply with the nondiscrimination safeguards.[66] Our experience with the implementation of ONA for the BOCs has reaffirmed our prior conviction that ONA serves an important function in fostering a fully and fairly competitive environment for the provision of enhanced services.[67] Our action today is an additional step toward achieving this public interest goal.[68]

---

reduced ONA and nondiscrimination safeguards for GTE in more detail below.

[64] GTE states that it is not contending that ONA safeguards applied to the BOCs should be changed. GTE Comments at 8.

[65] Insofar as GTE's request that it be allowed to continue with voluntary measures and its other arguments could be viewed as an attempt to challenge in a general fashion the reasonableness of the existing ONA requirements and nondiscrimination safeguards as applied to GTE, we find that such arguments are adequately addressed in prior Computer III and ONA orders, and we incorporate herein the reasoning in those orders. See supra. n. 3. GTE's requests for modification of specific aspects of the BOC requirements when applied to GTE are discussed in more detail in the following sections.

[66] Enhanced service providers and certain other parties strongly support our imposing these requirements on GTE, even though they have criticized the Commission's safeguards as not going far enough. Despite this, they believe that the application of ONA requirements and nondiscrimination safeguards would be substantially superior to the current situation. MCI Comments at 1; ATSI Comments at 13-4.

[67] ONA Remand Order, 5 FCC Rcd at 7720, paras. 7-11.

[68] In the Notice, we stated that "it appears that the GTE Consent Decree no longer requires GTE to establish a separate subsidiary or division for its provision of information services." 7 FCC Rcd 8664, 8666 n.24. In its comments, the NAB argues that the Commission should not assume that the GTE Consent Decree's separation requirements are no longer in effect. NAB Comments at 2-3, and 6-7. It also urges the Commission "to retain the separate subsidiary requirements placed on GTE by the Consent Decree ...." Id. at 7. GTE states that the Commission has never made GTE subject to a separate subsidiary requirement, and that the restrictions of the GTE Consent Decree regarding the provision of information services do not amount to a separate subsidiary requirement. It appears that the GTE Consent Decree no longer requires structural separation for the provision of information services. See U.S. v. GTE Corp., No. 83-1298-HHG (D.D.C. Nov. 27, 1991). Of course, definitive interpretation of the GTE

III. Specific ONA Requirements and Nondiscrimination Safeguards for GTE

A. ONA Plan

25. In the Notice, we proposed to require, within twelve months of the release of this Order, that GTE comply with the same ONA requirements and nondiscrimination safeguards that apply to the BOCs.[69] We proposed to streamline implementation of ONA requirements and nondiscrimination safeguards by GTE based on experience we gained implementing ONA for the BOCS. We also sought comment on whether we should modify the BOC requirements insofar as we apply them to GTE. In this Order, we require GTE to comply with the ONA requirements and nondiscrimination safeguards applicable to the BOCs.[70]

26. Since we conclude that GTE must comply with the same requirements we have established for the BOCs, we refer GTE to the numerous orders in the Computer III and the ONA proceedings that provide detailed review and guidance on how it should implement ONA. Among other things, we require GTE to comply with the CEI requirements and all other ONA requirements imposed in the Computer III and ONA proceedings. We do not require that GTE detail these measures in the ONA plan it must submit to the Commission as long as GTE's ONA program follows specific procedures approved for the BOCs and is consistent with requirements set out in the ONA orders.[71] If GTE wants to request authority to meet the requirements in a different way, it must justify the request in its ONA plan. We do not expect that GTE will use the latter option as an opportunity to relitigate the requirements of the

---

Consent Decree, is the province of the courts. See New York SMSA Limited Partnership, 58 RR 2d 525, 530 (1985). In any event, to the extent that the NAB requests that we impose a structural separation requirement, that request is beyond the scope of this proceeding.

[69] In the Computer III proceeding, we developed the regulatory framework of ONA. Phase I Order, 104 FCC 2d at 1039-43, paras. 154-167. ONA has been evolving since 1986, and it functions as one of the nonstructural safeguards that help prevent discrimination against competing ESPs. As we stated in the ONA Remand Order, ONA produces public interest benefits, and should be implemented independent of any other safeguards for BOC provision of enhanced services. ONA Remand Order, 5 FCC Rcd at 7720, para. 7. In the BOC Safeguards Order, we also instituted a strengthened set of cost accounting and nondiscrimination safeguards to govern the BOCs' participation in the enhanced services market. BOC Safeguards Order, 6 FCC Rcd at 7576, para. 10, 7624 n. 212.

[70] GTE is to comply with the requirements applicable to the BOCs except insofar as exceptions are authorized in this Order.

[71] GTE must state in its plan when it is complying with ONA plan requirements in a specific manner already approved for the BOCs.

Computer III and ONA proceedings.[72] The GTE ONA plan must be filed nine months after the release of this Order.[73] In addition, we require that GTE participate in the Information Industry Liaison Committee (IILC) beginning thirty days after publication of this Order in the Federal Register. GTE must also report to the Commission on its progress on IILC activities as we have required the BOCs to do. We address below specific claims by GTE regarding the applicability of the ONA requirements to GTE.

B. ONA Requirements

1. Initial ONA Offerings and Deployment Projection Reports

27. Background/Notice. In the Notice, we proposed to review GTE's ONA offerings under the standards we applied to the BOCs.[74] Thus, we proposed to require that GTE demonstrate that its proposed initial set of ONA service offerings will adequately meet the needs of ESPs in its service areas. As was the case with the BOCs, we proposed to require that GTE provide annual deployment projections for the current year and each of three future years by type of ONA service.[75]

28. Positions of the Parties. GTE states that the annual ONA Service Deployment Projection Report contains percentages of lines in market areas that are, or will be, capable of providing an ONA service. GTE argues it should not be required to file this report because ESPs are able to use the percentages shown by the BOC as a guide for all LECs in that market because most areas are dominated by

---

[72] Accordingly, we do not expect GTE to propose in its ONA plan specific measures that we have previously rejected absent extraordinary circumstances.

[73] We delegate to the Common Carrier Bureau authority to review and act on GTE's ONA plan.

[74] See Notice, 7 FCC Rcd at 8668, para. 17.

[75] GTE would be required to show the percentage of total access lines for which ONA services are provided in GTE's entire territory and by market area for all proposed interstate and intrastate ONA services, including BSAs, BSEs, CNSs, and ANSs. As used in the BOC ONA plans, the term "market area" generally referred to a contiguous geographic area whose boundaries were delineated by the BOC. A market area encompasses at least one standard metropolitan statistical area (SMSA) or, in the case of densely populated states, one consolidated statistical area (CSA), as defined by the United States Census Bureau. "Market areas" do not necessarily encompass an entire local access and transport area (LATA). See BOC ONA Order, 4 FCC Rcd at 179-80 n.822.

BOCs. GTE states that for the report to be useful, an ESP would need to know whether GTE's presence in the market area is significant. GTE further states that ESPs with this knowledge are sufficiently informed about the particular market area that the value of the additional information contained in the report would not outweigh the production cost. GTE states that for ESPs to use the GTE report, ESPs will need to weigh the BOC and GTE percentages of lines served.[76]

29. GSA states that we should consider GTE's argument for not complying with the annual ONA service deployment projection report requirement. GSA states that as a practical matter, ESPs gain little from, and may be misled by, forecasts relating to deployment by carriers having only a minor share in a given market. GSA states that we should consider exempting carriers from reporting these statistics in markets in which their share is perhaps, for example, 20% or less.

30. Discussion. We require that GTE demonstrate in its ONA plan that its proposed initial offering of ONA services will adequately meet the needs of ESPs in its service areas.[77] We note, based on our preliminary review of the ONA services included in GTE's voluntary ONA program, that the list of services is representative of ONA services currently provided by the BOCs,[78] but we will give parties another opportunity to comment specifically on the initial set of offerings after the plan is filed.

31. We also require GTE to file ONA deployment projections. These projections provide continuing information to the Commission and ESPs on what services will be available in specific areas in the near future, and thus provide the opportunity for interested parties to seek any needed changes on a timely basis. We disagree with GTE's argument that the deployment reports will be misleading. We require GTE to provide the total number of lines in each market area as well as the percentage of the lines on which particular ONA services are available. ESPs that want information about BOC services in a market area can review the BOC deployment reports.

---

[76] GTE Comments at 62-3.

[77] Id. at Appendix U.

[78] In Computer III, we required the BOCs to justify their initial offerings of ONA services based on the expected market demand, the services' utility as perceived by enhanced services competitors, and technical and costing feasibility. Phase I Order, 104 FCC 2d at 1065-66, para. 217. In the BOC ONA Order, we carefully reviewed the BOCs' proposed initial ONA service offerings in this regard. We approved the proposals in part but also required each BOC to compare its offerings to those of other BOCs in an attempt to achieve greater uniformity among the proposed BOC ONA offerings. We approved the BOCs' proposed offerings in the BOC ONA Amendment Order, 5 FCC Rcd at 3104, para. 1. Subsequently, the BOCs filed their ONA tariffs implementing the offering of their approved ONA service proposals.

32. Accordingly, we require that GTE comply with the ONA deployment projection reporting requirements applicable to the BOCs. Among other things, GTE is to provide in its ONA plan annual deployment projections for the current year and each of three future years for each ONA service, showing the percentage of access lines served in GTE's entire territory and by market area for all proposed interstate and intrastate ONA services, including BSAs, BSEs, CNSs, and ANSs.[79] This information must be filed with GTE's ONA plan nine months after release of this Order. Thereafter, the deployment report must be filed annually with the other annual reports discussed below on July 31 of each year beginning July 31, 1996.

2. Annual and Semiannual ONA Reports

33. Under our proposal, GTE would also be subject to all of the annual and semiannual ONA reporting requirements that are applicable to the BOCs. In addition to the projected deployment schedules for their ONA services, which are discussed above, the GTE annual reports are to include: new ONA service requests from ESPs and ONA service requests that were previously deemed technically infeasible; information on SS7, ISDN, and IN projected deployment; new ONA services available through SS7, ISDN, and IN; various progress reports on the implementation of service-specific and long-term uniformity issues, billing information, and OSS services, and a list of BSEs used in the provision of GTE's own enhanced services.[80] In the BOC ONA Further Amendment Order, we required the BOCs to provide semi-annual reporting of tariffed ONA services by state and federal jurisdiction. We tentatively concluded that these requirements would assure achievement of our public interest objectives for application of ONA requirements to GTE. The semiannual reporting requirements would include the filing of a matrix of GTE ONA services and state and federal tariffs; data regarding state and federal tariffs; the ONA Services User Guide; and other updated information in the areas of ESP requests, GTE responses, and services offered.[81]

---

[79] To facilitate review of GTE's proposed initial offering of ONA services and comparison with the ONA services offered by the BOCs, we require that GTE use the generic ONA Services User Guide names in its description of its proposed ONA services.

[80] BOC ONA Further Amendment Order, 6 FCC Rcd at 7677-78, Appendix B.

[81] BOC ONA Further Amendment Order, 6 FCC Rcd at 7677-78, Appendix B. BOC Open Network Architecture Tariffs, 7 FCC Rcd 1512 (1992) (Ameritech not included); Ameritech Operating Companies, Revisions to Tariff F.C.C. No. 2, Open Network Architecture, 7 FCC Rcd 257 (1992) (Ameritech's ONA transmittals became effective in December 1991).

34. Positions of the Parties. GTE states that a tariff referencing report for its operations would be far larger and more complex than any BOC report because GTE has over 180 tariffs, substantially more than any BOC. GTE also states that compiling the ONA Services User Guide information would be a major effort that would produce an unwieldy report of little use to anyone. GTE claims that information on central offices would result in more than 10,000 pages of information, thus requiring ESPs to wade through three times as much information in order to get a quarter of usable information per entry. GTE disputes the need for technical capabilities annual reports, arguing that since it uses the same switches as BOCs, GTE's reports would be similar to those filed by the BOCs. GTE argues that significant costs will have to be incurred in preparing these reports because of the demographic and organizational differences between GTE and the BOCs. In addition, GTE argues that this report would produce information of little incremental value and would likely confuse ESPs.

35. Discussion. We believe that the semi-annual tariff report will give ESPs valuable information to use in determining where tariffed services are available from GTE. This report will enable the Commission and others to monitor the availability of ONA services by state and federal jurisdiction. Thus, we require GTE to begin providing this report to the Commission on September 30, 1995, and every six months thereafter.[82] We also conclude that the annual reports like those we have required for the BOCs are necessary to monitor the progress of GTE in implementing ONA. Accordingly, we require that GTE comply with these annual reporting requirements described in the BOC ONA Amendment Order, beginning July 31, 1996.

C. Nondiscrimination Safeguards

36. In Computer III, we developed a set of nondiscrimination safeguards and requirements that govern the BOCs' provision of enhanced services. These nondiscrimination safeguards consist of Customer Proprietary Network Information (CPNI) rules, network information disclosure rules, and nondiscrimination reporting requirements. As a Tier 1 LEC, GTE is already fully subject to the same cost accounting safeguards adopted in the BOC Safeguards Order.[83]

37. The CPNI rules permit the BOCs to participate efficiently in the enhanced services market while balancing efficiency

---

[82] See BOC ONA Further Amendment Order, 6 FCC Rcd at 7678. GTE may address concerns about the size and format of the ONA Users Guide Central Office report in its ONA plan. We delegate authority to the Chief, Common Carrier Bureau to review and to act on any requested changes in this reporting requirement for GTE.

[83] See supra n. 7.

goals with competitive equity and privacy considerations.[84] Network information disclosure rules ensure that independent ESPs receive timely access to technical information related to new or modified network services affecting the interconnection of enhanced services to the BOC networks.[85]

38. In the Notice, we proposed to streamline implementation of nondiscrimination safeguards for GTE by requiring it to comply with each of these requirements in a manner already approved in an ONA plan for at least one of the BOCs, unless GTE justifies a different approach in this rulemaking.[86] In this Order we require that GTE comply with all the nondiscrimination safeguards applicable to the BOCs. GTE must address how it will comply with the nondiscrimination safeguards in its ONA plan.[87] We address below each of GTE's arguments opposing application of the specific BOC ONA nondiscrimination safeguards to GTE.[88]

---

[84] BOC ONA Order, 4 FCC Rcd at 223, para. 430; BOC ONA Amendment Order, 5 FCC Rcd at 3119, para. 137; BOC Safeguards Order, 6 FCC Rcd at 7605-14.

[85] Under our network information disclosure rules, a BOC must disclose the relevant network information to an ESP at the "make/buy point" (subject to the ESP's execution of a nondisclosure agreement) and to the public at a point six to twelve months before introduction of the new or modified network service. Phase II Order, 2 FCC Rcd at 3087-88, paras. 107-12; see Phase I Order, 104 FCC 2d at 1080-86, paras. 246-55.

[86] Notice, 7 FCC Rcd at 8669, para 18.

[87] See supra para. 26. We do not require that GTE detail how it will comply with the nondiscrimination safeguards in the ONA plan as long as GTE's safeguards follow specific procedures approved for the BOCs and are consistent with our requirements. GTE must state in its plan when it is complying with nondiscrimination safeguards in a specific manner already approved for the BOCs.

[88] On December 22, 1992, NATA filed a petition requesting that we expand the scope of this proceeding to consider whether to apply nondiscrimination safeguards to GTE's provision of customer premises equipment (CPE). In its reply comments, NATA reiterates its request that we apply the same level of safeguards to GTE's CPE as to its enhanced services. NATA argues that, with the recent merger GTE is now larger than most of the BOCs, which are all subject to such nondiscrimination safeguards. See NATA Petition to Expand the Scope of Rulemaking, CC Docket No. 92-296, and NATA Reply Comments at 1-3. GTE argues that NATA's petition is without merit because we have decided this issue and there is no support for NATA's claim that GTE is discriminating against independent CPE vendors. GTE Comments at 32-3. In instituting this proceeding we did not propose to impose nondiscrimination safeguards for GTE's provision of CPE. Thus, NATA's request is beyond the scope of this proceeding. Moreover, as a matter

1. CPNI

39. Background. Our CPNI requirements apply with minor exceptions to all information obtained by the BOCs as a result of a customer's use of network services.[89] Under our CPNI rules, the BOCs' enhanced services marketing personnel may not access the CPNI of customers with more than twenty lines unless they have obtained prior authorization from the customer. Nor can BOC personnel access the CPNI of any customer that requests that such information be withheld from BOC personnel. Independent ESPs must obtain advance authorization from the customer to obtain access to customer CPNI. We also require BOCs to provide an annual written notice of CPNI rights to all multi-line business customers. Any aggregated CPNI that a BOC makes available to its employees involved in the marketing of its enhanced services must also be made available to independent ESPs on the same terms. Under our rules, BOCs must also develop password/ID systems to restrict the access of enhanced services marketing personnel to databases containing CPNI.

40. Positions of the Parties. Hawaii strongly supports application of the BOC CPNI requirements to GTE arguing that GTE would have an unfair competitive advantage in providing enhanced services if it is not subject to these requirements. Hawaii states that, without this, GTE may decide at any time, without penalty, to use CPNI information to its competitive advantage. Both ATSI and Hawaii also point out that the BOCs are required to share aggregated CPNI reports with unaffiliated ESPs, and that GTE is not subject to such a requirement.[90]

41. According to GTE, its CPNI practices achieve the goals of the Commission's CPNI requirements to the extent possible, given its special circumstances. GTE also states that it has sent a CPNI notification to all identified ESPs within its service areas. In addition, GTE contends its procedures are designed to ensure that GTE's enhanced services operations compete fairly with other ESPs.

42. GTE objects to the Commission's CPNI requirements for two reasons. First, GTE argues that it would be costly to require automatic restriction and customer notification for multiline

---

of administrative convenience we believe that any consideration of CPE safeguards should take place in a separate proceeding. Accordingly, we deny NATA's request to consider safeguards for GTE's provision of CPE in this proceeding.

[89] BOC ONA Order, 4 FCC Rcd at 213, para. 411.

[90] Hawaii Comments at .9; ATSI Comments at 5-6.

businesses.[91] Second, GTE argues that customers would be inconvenienced by having simple inquiries about service referred to a new, specially created contact organization. GTE contends that customers would incur delays and would lose rapport with their sales person. GTE states that, unlike the BOCs, it typically provides service in areas of dispersed population, including large numbers of rural areas, where many customers rely on GTE for assistance. GTE argues that, under the CPNI requirements, it will not be able to provide such assistance.[92]

43. GTE states that it currently employs two groups of personnel for marketing enhanced services: a sales group that is not solely responsible for sale of enhanced services, and a product managers group that is solely responsible for developing and marketing for each individual service. GTE argues that it cannot justify the costs of supporting sales specialists for enhanced services only, as GTE believes would be required under the CPNI safeguards. GTE claims that access to CPNI by these employees does not pose a threat to customer privacy. GTE adds that it is not its policy to use CPNI to generate lists for sales prospects, and that product managers have no ability to discriminate among customers.[93]

44. GTE claims that, as for password ID requirements, it "flags" accounts upon being notified in writing by customers that their CPNI is not to be shared. Hawaii argues that this approach is unsatisfactory for two reasons: (1) GTE is not required to notify GTE's customers of their CPNI rights, and (2) access to restricted accounts is still permitted for GTE-affiliated enhanced services personnel without a password ID system in place.[94]

45. Discussion. We conclude that GTE has not raised any persuasive arguments for approving a program of reduced CPNI compliance. Our CPNI requirements reflect a careful balancing of customer privacy, efficiency, and competitive equity interests. GTE's current voluntary program falls short of the BOC requirements in a number of important respects. For example, GTE proposes to provide notification of customer CPNI rights only to ESP customers rather than to all multiline business customers. In addition, GTE does not obtain authorization to use the CPNI from customers with more than twenty lines. The contentions that GTE has raised concerning the dispersed and rural nature of its service area do not persuade us that there are

---

[91] GTE estimates that this would cost $2 million for the first year, $5 million over five years, and $11 million over ten years. GTE Comments at 51.

[92] GTE also believes that multi-line business customers would be particularly confused by the required polling of their preference on the treatment/access to their CPNI. GTE Comments at 50-2.

[93] GTE Comments at 44-53; GTE Reply Comments at 28.

[94] Hawaii Comments 9.

special costs applicable to GTE that warrant giving GTE customers less CPNI protection than BOC customers.[95] We have previously rejected as insufficient GTE's approach of flagging records.[96] Accordingly, we require that GTE comply with the same CPNI requirements established for the BOCs within fifteen months of the release of this Order.[97] In its ONA plan, GTE must describe how it will meet the CPNI requirements and include the CPNI notification letter it proposes to send to its multiline business customers.[98]

2. Operations Support Systems (OSS)

46. Background. In the BOC ONA Reconsideration Order, we required that the following OSS capabilities be treated as basic ONA services: service order entry and status; trouble reporting and status; diagnostics, monitoring, testing and network reconfiguration; and traffic data collection.[99] The BOC ONA Amendment Order also required that BOC enhanced services operations have the same access to OSS services as the BOCs provide to other ESPs.[100] In the BOC ONA Amendment Reconsideration Order, we clarified that the OSS "same access" requirement applies to BSAs and BSEs that BOC enhanced service providers and independent ESPs order to provide enhanced services. We also directed the BOCs to work with ESPs through the IILC to develop methods for providing ESPs indirect access to OSS services for CNSs.[101]

---

[95] We do not find that the possibility for initial multiline business customer confusion is a sufficient reason to preclude the benefits customers derive from being informed of their CPNI rights.

[96] Notice, 7 FCC Rcd at 8668, para. 12.

[97] Because GTE may need additional time to implement password ID systems, we allow GTE two years from the release of this order to comply with the password ID requirements.

[98] See supra para. 26. We do not require that GTE detail its CPNI procedures in the ONA plan as long as GTE's procedures follow specific procedures approved for the BOCs and are consistent with our requirements. GTE must state in its plan when it is complying with CPNI requirements in a specific manner already approved for the BOCs.

[99] 5 FCC Rcd at 3087, para. 26. The BOC ONA Reconsideration Order stated that specific ESP requests for these OSS services must be evaluated according to the criteria established in the Phase I Order: expected market demand; their utility as perceived by ESPs; and their technical and cost feasibility of unbundling and providing these services. 104 FCC 2d at 1065, para. 217.

[100] 5 FCC Rcd at 3108, para. 43.

[101] BOC ONA Amendment Reconsideration Order, 8 FCC Rcd at 97, para. 1.

47. Positions of the Parties. GTE states that it is more than willing to satisfy ESP needs for OSS, but only if the ONA criteria for service provision are satisfied. Otherwise, GTE argues, application of BOC OSS access requirements is unnecessary and premature. GTE also states that it is developing an OSS Access Customer Gateway (ACG) for IXC customers, and that it will provide OSS access to non-IXCs and ESPs when sufficient demand exists to justify the introduction of such services. MCI opposes GTE's request to be excused from the Commission's OSS requirement, arguing that GTE never explains why ESPs should not have the same access to OSS functions that GTE's own enhanced services have.[102] GTE, however, believes that ESP demand for OSS access is very limited.[103] GSA believes that one year is not an unreasonably short period for GTE's ONA implementation, but that some flexibility may be warranted, especially with OSS.[104]

48. GTE states that the ACG system does not permit OSS access for services purchased from GTE's local tariffs, or satisfy the provision of access to OSS capabilities to ESPs as originally envisioned by the Commission. GTE contends that such a system would be far more complex and costly. GTE argues that it has a number of different OSS systems throughout the former seven GTE operating units and the Contel units, and that these multiple systems present a severe impediment to providing the access to OSS that ESPs might desire.[105] GTE states that it has the same form of access for order entry/status and trouble/status as the Commission mandates. GTE states that it is standard company practice for employees of GTE enhanced service operations to place orders for BSAs and BSEs in the same manner as independent ESPs.[106]

49. Discussion. In the BOC ONA Amendment Order, we stressed the importance of comparably efficient access for ESPs to the OSS functions offered by the BOCs. We have carefully balanced the importance of this equal access to OSS functions by ESPs with the

---

[102] MCI Comments at 7-9.

[103] GTE bases this on the following factors: the lack of demand for ONA services at the federal level; the lack of ESP requests to GTE for OSS; the lack of ESP interest expressed to GTE for OSS access in its primary market research studies; and GTE's observation that ESPs either are not willing to share their OSS access requirements, or are not capable of defining those requirements with any specificity. GTE Comments at 54.

[104] GSA Reply Comments at 7-8.

[105] GTE Comments at 55-56.

[106] Id. at 57-8.

effect of denying access to OSS by BOC joint marketing personnel.[107] We conclude that GTE has not raised any argument that would persuade us to modify the application of the OSS access requirements in the case of GTE. Access to OSS is as important to ESPs in GTE's service areas as it is in the BOCs' service areas. Moreover, with the clarification of the OSS requirements made in the BOC ONA Amendment Reconsideration Order, the OSS requirements would not appear to impose major burdens on GTE.[108] Accordingly, we require that GTE describe how it will comply with the OSS requirements in its ONA plan and that GTE comply with all of the OSS requirements within fifteen months from the release of this Order.[109]

3. Network Information Disclosure Rules

50. Background. The Network Information Disclosure rules ensure that independent ESPs receive timely access to technical information related to new or modified network services affecting the interconnection of enhanced services to the BOC networks. Under these rules, a BOC must disclose the relevant network information (1) to an ESP at the "make/buy point," subject to the ESP's execution of a nondisclosure agreement, and (2) to the public between from six and twelve months before introduction of the new or modified network service.[110]

51. Positions of the Parties. GTE argues that the Commission's rules should not apply to it because GTE does not engage in "make/buy" decisions, and it informs all customers of the introduction of new network capabilities.[111] GTE contends that because it must interconnect with other independents, IXCs, and ESPs, it has a strong incentive to comply with uniform industry standards. In this regard, GTE notes that it deploys only new services and network interface changes that conform to Bellcore requirements. GTE also contends that because it plays such a limited role in designing new

---

[107] BOC ONA Amendment Reconsideration Order, 8 FCC Rcd 97 (1993).

[108] GTE's original estimates of $16 million to implement the OSS requirements do not reflect the clarifications in the BOC ONA Amendment Reconsideration Order.

[109] See supra para. 26. We do not require that GTE detail its OSS requirements in the ONA plan as long as GTE's requirements follow specific procedures approved for the BOCs and is consistent with our requirements. GTE must state in its plan when it is complying with OSS requirements in a specific manner already approved for the BOCs.

[110] Phase II Order, 2 FCC Rcd at 3087-88, paras. 107-12; see Phase I Order, 104 FCC 2d at 1080-86, paras. 246-55.

[111] GTE Comments at 14-15 and Attachment G.

network services, it is limited in its ability to discriminate in favor of its own enhanced services operation in this area and in making technical network changes.[112] In addition, GTE notes that it is already subject to the All Carrier Rule[113] and GTE Consent Decree,[114] and argues that existing safeguards are sufficient in light of GTE's role as a purchaser rather than a developer of network products to preclude any discrimination. GTE contends that it has an active program to identify ESPs and develop and implement services responsive to their needs. In fact, GTE states it has many offerings comparable to those proposed by the BOCs and approved by the Commission.[115]

52. Hawaii and MCI oppose GTE's argument that it should not be subject to the make/buy aspect of the network disclosure requirements. Hawaii states that although GTE no longer has an exclusive manufacturing affiliate, GTE remains involved in a joint switch-manufacturing operation with AT&T. Hawaii also states that many GTE operating companies use equipment originally manufactured by GTE's Automatic Electric.[116]

53. Discussion. We agree with MCI and Hawaii that the ONA network disclosure rules should apply to GTE's provision of enhanced services. The All Carrier Rule does not provide the same level of protection from discrimination as the ONA network disclosure rules. We do not find GTE's argument that it has a limited role in equipment design to be a reason to treat GTE differently than the BOCs since the BOCs are prohibited under the MFJ from manufacturing network equipment while GTE is under no similar limitation. The disclosure of new interfaces, new network services, and other changes to the network in a timely fashion, as required by the network disclosure rules, is important to ESPs in a competitive environment. Accordingly, GTE must describe in its ONA plan how it intends to comply with the network disclosure rules and it must comply with these rules effective fifteen months from the release of this Order.[117]

---

[112] GTE Comments at 64.

[113] See 47 C.F.R. Section 68.110.

[114] U.S. v. GTE Corp., 1985-1 Trade Cas. (CCH) para. 66,355, section IV (Jan. 29, 1985) (GTE Consent Decree); see U.S. v. GTE Corp., 603 F. Supp. 730, 742 (D.D.C. 1984) (order authorizing the GTE Consent Decree).

[115] GTE Comments at 65-9.

[116] Hawaii Comments at 7; MCI Comments at 7-8.

[117] See supra para. 26. We do not require that GTE detail its network disclosure requirements in the ONA plan as long as GTE's requirements follow specific procedures approved for the BOCs and are consistent with our requirements. GTE must state in its plan when it is complying with network disclosure requirements in a specific manner already approved for the BOCs.

4. Nondiscrimination in Installation and Maintenance

54. Background. The nondiscrimination reporting requirements protect against possible discrimination against ESPs by the BOCs in the quality, installation, and maintenance of basic services. These requirements compare the quality of basic service provided to the BOC's own enhanced services with that of basic services provided to the BOC's ESP competitors.

55. Under our nondiscrimination reporting requirements, each BOC must: (1) demonstrate that its procedures and systems for providing services preclude discrimination in installation and maintenance, and quality of ONA services; (2) file annual affidavits attesting that it has not discriminated in the quality of installation and maintenance of ONA services provided to its ESP competitors; and (3) file quarterly reports comparing the timeliness of its installation and maintenance of basic services for its own enhanced services operations with that for all customers.[118]

56. Positions of the Parties. GTE argues that before we consider imposing such heavy reporting costs on GTE, we should inquire into the following: (1) whether existing reports could be useful for GTE customers; (2) how the information will be used; (3) why reports would be preferable or superior to other preexisting sources for the same information; and (4) whether there are any modifications that would make such reports useful to GTE customers. GTE contends that an inquiry into these issues would establish that the benefits of GTE reporting do not justify the cost.[119] GTE further contends that its existing installation and repair methods preclude discrimination, and that the cost and manpower associated with these ongoing reporting requirements is greater for GTE than for the BOCs. Finally, GTE contends that the reports would contain information about predominately rural service areas thereby providing little, if any, benefits to ESPs.[120]

57. Hawaii argues that without nondiscriminationreporting, it is virtually impossible to know whether or not discrimination has occurred. Hawaii further argues that because GTE's processes already create a "paper trail," filing nondiscrimination information with the Commission will not impose any significant burden on GTE.[121]

---

[118] See Phase I Order, 104 FCC 2d at 1055-56, para. 192, 1066, para. 218; Phase II Reconsideration Order, 3 FCC Rcd at 1160, paras. 76-77; BOC ONA Order, 4 FCC Rcd at 235, para. 451, 248-49, para. 481.

[119] GTE Comments at 63.

[120] Id. at 60.

[121] Hawaii Comments at 9.

58. Discussion. We conclude that GTE has not demonstrated with any specificity why it should be subject to nondiscrimination reporting requirements substantially different from those imposed on the BOCs. We find that these reports, in particular, provide a useful check on possible discrimination, and note that the information included in these reports is not available from other sources. While more of GTE's local exchanges have relatively few access lines when compared to the BOCs, some of the BOCs also have a large number of small exchanges. We nonetheless concluded that the benefits of those nondiscrimination reporting safeguards for the BOCs outweighed the disadvantages. We reach the same conclusion here and decline to apply a reduced or modified set of reporting requirements to GTE.

59. Thus, we require GTE to comply with the nondiscrimination reporting requirements applicable to the BOCs. In particular, GTE must file an annual affidavit stating that it does not discriminate in providing ONA services to competitive ESPs and their customers, including the installation, maintenance, and quality of such services. The annual affidavit must be signed by the officer principally responsible for ONA service quality, installation, and maintenance. We also require that GTE file quarterly installation and maintenance reports using the reporting categories adopted for BOC reports unless GTE proposes and we approve a different format for its quarterly report in its ONA plan.[122] GTE's initial installation and maintenance report is to cover the first full calendar quarter following the implementation date for ONA requirements and nondiscrimination safeguards. Thereafter, GTE must file these reports quarterly.[123]

IV. Implementation

60. Background. In the Notice, we proposed to streamline implementation of GTE's initial ONA offerings by foregoing the sequential ONA process used for the BOCs, instead requiring GTE to file its ONA tariffs at or about the same time that it files its proposed initial offering of ONA services. We solicited comment on two alternatives for the timing of review of GTE's proposed initial offerings of ONA services and its ONA tariffs. The first alternative proposed that GTE submit its ONA tariffs and its justification of its initial ONA services at the same time. Under the second alternative,

---

[122] This format should be consistent with the installation and maintenance system reports required of the BOCs and described in BOC ONA Reconsideration Order at Appendix B. GTE may, however, attempt to justify different service categories at a comparable level of detail. We delegate authority to the Chief, Common Carrier Bureau to review and to act on any requested changes to the reporting categories.

[123] The report for each calendar quarter is due thirty days after the close of that calendar quarter.

GTE would submit the justification for its initial ONA offerings sixty days before filing its ONA tariffs.

61. Positions of the Parties. GTE argues that by filing an ONA plan prior to filing the tariffs, it will be able to minimize the costs of developing the tariffs.[124] GTE, ITN, and MCI also support requiring GTE to file an ONA plan in advance of its tariffs. Only one party, GSA, supports a simultaneous filing.

62. GTE, however, states that it is not confident that all the BOC requirements could be implemented within twelve months as proposed in the Notice. GTE states that because some changes are likely to require more than a year to implement, it might need to request limited waivers for some requirements. GTE adds that any subsequent changes to these requirements should include specific and reasonable timeframes for compliance considering GTE's unique implementation circumstances.[125]

63. Discussion. The experience gained from our lengthy review of the BOCs' initial ONA plans and tariffs, as well as from the implementation of approved BOC ONA service offerings, enables us to streamline our review of GTE's initial ONA service offerings. The BOC experience provides substantial guidance to GTE concerning our standards for evaluating the adequacy of such offerings and has developed further expertise within the Commission on these matters.

64. We conclude that GTE must implement all ONA requirements and nondiscrimination safeguards fifteen months after release of this Report and Order unless another time period is specified in this Order. These requirements include those that have been developed in the Computer III and Computer III remand proceedings and the BOC ONA Orders, as well as any future requirements that the Commission may establish for the BOCs, unless GTE is specifically exempted.[126] Further, GTE shall submit an ONA plan within nine months of the release of this Order and shall file state and federal ONA tariffs for its ONA services within one year of the release of this Order. These tariffs will be subject to the requirements established in the ONA proceeding and the federal tariffs will also be subject to the pricing and other requirements of CC Docket 89-79, relating to the

---

[124] GTE Comments at 76.

[125] Id. at 77.

[126] GTE must amend its initial federal ONA tariff to include any requirements that are adopted so close to the GTE tariff filing date that they cannot be reflected in the initial tariff filing as soon as possible during the three month public notice period.

creation of access charge subelements and cost support requirements for ONA.[127]

V. Preemption

65. Background/Notice. In the BOC Safeguards Order, we preempted state requirements for structural separation of facilities and personnel used to provide the intrastate portion of jurisdictionally mixed enhanced services. We also preempted state CPNI rules that require prior authorization that is not required by federal rules and state network information disclosure rules that require initial disclosure at a time different from what is required by the federal rule. We did not preempt other state safeguards, but stated that we would review them, if necessary, on a case-by-case basis.[128] We also stated that our preemption of state structural separation requirements and state CPNI rules covered state requirements applicable to AT&T, the BOCs, and independent telephone companies. Those preemptions are in full effect and prohibit states from requiring structural separation or imposing a prior CPNI authorization requirement for GTE's provision of enhanced services. We stated in the BOC Safeguards Order, however, that we would not preempt state network information disclosure rules applicable to carriers, such as GTE, that are not subject to the federal network information disclosure rule.

66. In the Notice, because we proposed to subject GTE to the federal network information disclosure rule, we also proposed to preempt state network information disclosure rules applicable to GTE that require initial disclosure at a time different from the timing specified in the federal rule.[129] In that order, we stated that our

---

[127] In addition, if GTE uses a computer model relying, in whole or in part, on proprietary data to develop its rates, it bears a substantial, initial burden of demonstrating circumstances that preclude reliance on publicly available data. GTE must also show that this model produces reasonably accurate results. See Part 69/ONA Report and Order and Order on Further Reconsideration and Supplemental Notice, 6 FCC Rcd 4524 (1991), Part 69/ONA Memorandum Opinion and Order on Second Further Reconsideration, 7 FCC Rcd 5235 (1992), Part 69/ONA Report and Order (Future Pricing), 8 FCC Rcd 2104 (1993), Part 69/ONA Recon., 8 FCC Rcd 3114 (1993), Open Network Architecture Tariffs of Bell Operating Companies Report and Order, 9 FCC Rcd 440 (1994). While we believe that the schedule we have established for GTE's implementation of ONA is reasonable in light of the experience we have gained in the course of BOC implementation, we will entertain requests for a waiver or extension of this schedule in appropriate circumstances.

[128] BOC Safeguards Order, 6 FCC Rcd at 7630-31.

[129] There was no need to propose to preempt state structural separation requirements and state CPNI rules that require prior authorization not required by federal rules since we had already preempted such requirements in the case of GTE in the BOC Safeguards

network information disclosure rule seeks to strike a balance between assuring that independent ESPs receive network information on a timely basis and preventing premature disclosure that could impair carriers' service development efforts and inhibit network innovation. We also found that a state rule that required initial disclosure at a time different from the federal rule would negate the federal rule on the timing for initial disclosure of network information because, by definition, initial disclosure can occur only once. We solicited comments on our proposal. We also solicited comment on what, if any, different preemption of state requirements would be warranted if we decided to adopt modified ONA requirements and nondiscrimination safeguards.

67. Positions of the Parties. NYDPS, the only party to comment on this issue, continues to oppose the preemption of state requirements regarding the provision of enhanced services. NYDPS argues that since none of the parties in this proceeding have proposed that the states be denied the ability to regulate GTE's provision of enhanced services, there is no basis to conclude that state policies would make it impossible for the Commission to effectuate its goals absent preemption.[130] NYDPS disagrees with the proposal to preempt additional state requirements for GTE.

68. Discussion. We adopt the same preemption of state network disclosure requirements for GTE that we established for the BOCs in the BOC Safeguards Order. We have previously carefully balanced the timing of the federal network disclosure rules applicable to the BOCs, and concluded that inconsistent state rules would disturb that balance. We do not believe that the GTE network disclosure requirements should differ from those we have applied to the BOCs, and we have previously found it necessary in the case of the BOCs to adopt rules that preempt state requirements which require initial disclosure at a point different from that specified by the Commission. Without preemption, any inconsistent state rule would negate the federal rule. Accordingly, we preempt state requirements that would require GTE to make an initial disclosure at a time different from that specified in the federal rule.[131] Since we require GTE to comply with the same ONA requirements and nondiscrimination safeguards we have previously applied to the BOCs, we do not find that any other modification to the preemption of state requirements adopted in the BOC Safeguards Order is warranted. [132]

Order.

[130] NYDPS Reply Comments at 1-2.

[131] NYDPS's comments opposing the preemption of state requirements, other than network disclosure requirements, regarding the provision of enhanced services are beyond the scope of this proceeding.

[132] BOC Safeguards Order, 6 FCC Rcd at 7630-31.

VI. Regulatory Flexibility Act

69. In the Notice in this proceeding, we certified that the Regulatory Flexibility Act of 1980 did not apply to this proceeding because the rule amendments would not have a significant ecohomic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. The rule changes directly apply only to GTE and its affiliated companies that are considered dominant in their field of operation. Neither the Chief Counsel for Advocacy of the Small Business Administration nor any commenting party challenged our analysis. The Secretary shall send a copy of this Report and Order, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 605(b) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq.

VII. Ordering Clauses

70. Accordingly, IT IS ORDERED, that pursuant to Sections 1, 4(i) and (j), 201-205, 218, 220 & 404 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) & (j), 201-205, 218, 220 & 404, and Section 553 of the Administrative Procedure Act, 5 U.S.C., Section 553, 5, and 218, that the policies, rules, and requirements set forth herein ARE ADOPTED.

71. IT IS FURTHER ORDERED, that GTE shall file an ONA plan nine months after release of this Order.

72. IT IS FURTHER ORDERED, that GTE shall file ONA tariffs three months after the date for filing the ONA plan. The federal tariffs shall be scheduled to become effective on three months public notice.

73. IT IS FURTHER ORDERED, that GTE shall implement ONA requirements and nondiscrimination safeguards within fifteen months from the release of this Order.[133]

74. IT IS FURTHER ORDERED, that GTE shall provide the reports described herein.

75. IT IS FURTHER ORDERED, that GTE shall comply with the CPNI password ID requirements within two years from the release of this Order.

---

[133] In a number of cases, filing dates in this Order are described as being a certain number of months after a particular event. In such cases the filing or other such date will be the same day of the month as the triggering event, but the specified number of months later. Months shall be counted beginning with the month after the one in which the triggering event occurs. Filing dates falling on a weekend or official federal government holiday will be moved to the next business day.

76. IT IS FURTHER ORDERED, that the petition to expand the scope of this proceeding filed by NATA IS DENIED.

77. IT IS FURTHER ORDERED, that the decisions in this Report and Order SHALL BE EFFECTIVE thirty days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix A

COMMENTS FILED February 22, 1993

1. Association of Telemessaging Services International, Inc. (ATSI)
2. Bell Atlantic telephone companies (Bell Atlantic)
3. General Services Administration (GSA)
4. GTE
5. State of Hawaii (Hawaii)
6. Independent Telecommunications Network, Inc. (ITN)
7. Information Technology Association of America (ITAA)
8. MCI Telecommunications Corporation (MCI)
9. National Association of Broadcasters (NAB)
10. Sprint Communications Company LP (Sprint)

REPLY COMMENTS FILED March 24, 1993

1. GSA
2. GTE
3. State of Hawaii
4. MCI
5. North American Telecommunications Association (NATA)
6. New York Department of Public Service (NYDPS)

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 94-144
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules to	)	GEN Docket No. 90-314
Establish New Personal Communications	)	RM-7140, RM-7175, RM-7618
Services	)	

MEMORANDUM OPINION AND ORDER

Adopted: June 9, 1994; Released: June 13, 1994

By the Commission: Commissioners Quello, Barrett, Ness, and Chong issuing separate statements.

TABLE OF CONTENTS

	Paragraphs
I. INTRODUCTION AND EXECUTIVE SUMMARY	1- 16
II. BACKGROUND	17- 23
III. SPECTRUM ISSUES AND SERVICE AREAS	24- 97
A. Allocation, Block Plan and Service Areas	24- 87
1. Block Positioning	28- 40
2. Block Size	41- 62
3. Aggregation and Disaggregation	63- 71
4. Service Areas	72- 79
5. Geographic Partitioning	80- 83
6. Unlicensed Devices	84- 87
B. Private Use	88- 90
C. Mobile Satellite Service Issues	91- 97
IV. OWNERSHIP RULES AND CELLULAR ELIGIBILITY	98- 146
A. Eligibility of Cellular Licensees for PCS Licenses	102-104
B. Attribution Rules	105-122
C. Attribution Rules for Certain Designated Entities	123-132
D. Population Standard	133-140
E. Post-Auction Divestiture	141-146

V. CONSTRUCTION REQUIREMENTS 147-158

VI. TECHNICAL STANDARDS 159-202
A. Roaming and Interoperability Standards 159-165
B. PCS Power Limits 166-174
C. Protection of Fixed Microwave Operations 175-193
D. PCS-to-PCS Interference Standards 194-201
E. Enhanced 911 Standards 202

VII. UNLICENSED PCS 203-244
A. Spectrum Allocation 203-208
B. Coordination 209-223
C. Spectrum Etiquette 224-244

VIII. RADIO FREQUENCY EXPOSURE LIMITS 245-249

IX. CONCLUSION 250

X. PROCEDURAL INFORMATION 251-252

Appendix A ..... Final Rules

Appendix B ..... List of Parties

Appendix C ..... Final Flexibility Statement

Appendix D ..... Broadband PCS Band Plan

Appendix E ..... Calculating PCS Signals at Microwave Receivers

Appendix F ..... Permissible Ownership of PCS Licenses by the Owners of Same-Area Cellular Systems

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. By this action, we amend certain aspects of our rules governing broadband personal communications services (PCS). We take this action in response to 67 petitions for reconsideration or clarification of the rules and policies adopted in the Second Report and Order in this proceeding.[1]

2. PCS encompasses a broad range of new radio communications services that will free individuals from the limitations of the wireline public switched telephone network and will enable individuals to communicate when they are away from their home or office telephones. Broadband PCS devices are likely to be portable and have their own unique telephone numbers. A basic feature of PCS is expected to be the ability to communicate person-to-person, rather than station-to-station.

3. We take this action to foster rapid creation of a competitive market to deliver these new mobile digital voice and data services to the American public. Personal communications needs are changing rapidly as our society becomes more mobile and people demand rapid communications no matter where they are or what time it is. A competitive market is the best way to introduce broadband PCS to help meet these demands. We expect that PCS will provide a variety of mobile services competitive with existing cellular, paging and other land mobile services as well as new services offering communications capabilities not currently available. These services will be provided on an entire family of new communications devices that will include small, lightweight multi-function portable phones, portable facsimile and other imaging devices, new types of multi-channel cordless phones, and advanced paging devices with two-way data capabilities. We expect that these new services and devices will affect the future development and configuration of all telecommunications networks by significantly improving their flexibility and increasing the number of functions they can perform.

4. We are amending the broadband PCS spectrum allocation and regulatory structure to better achieve what have been and continue to be our four primary goals in this proceeding: competitive delivery, a diverse array of services, rapid deployment, and wide-area coverage.[2] Furthermore, our PCS rules as modified will partner with our competitive bidding procedures to meet Congressional objectives that include promoting economic growth and competition,

---

[1] See Second Report and Order, GEN Docket No. 90-314, 8 FCC Rcd 7700 (1993) (Second Report and Order). This includes a petition filed by Apple on September 13, 1993, which was separately put on notice and comment separately received. Id. at ¶ 92.

[2] See Second Report and Order at ¶ 5.

enhancing widespread access to telecommunications service offerings, and ensuring that PCS licenses are disseminated to a wide variety of applicants.[3]

5. The actions we take are designed to enable PCS providers to compete effectively with each other and with other wireless providers so that the American public can enjoy the greatest benefit from the delivery of these new services. To promote competitive delivery, we have modified the band plan to ensure there is an opportunity for a sufficient number of competitors to offer PCS services. Further, providers will have the flexibility to determine the amount of spectrum needed for their particular service or services. However, we have also set limits on the total amount of spectrum that can be acquired by new entrants and by incumbent cellular providers. This ensures that there will be a significant number of competitors in each area.

6. We have purposely adopted a broad definition of PCS to encourage a variety of firms with their own visions of PCS to bid for various combinations of licenses and to provide a diverse array of new services. Firms will compete not only on price, but also on quality and the types of new products and services they offer. We have allocated spectrum both in different sized blocks and in different sized service areas because we want to encourage businesses to be able to acquire the spectrum and service areas that best suit their business plans. This additional flexibility will result in a greater diversity of products and services for consumers.

7. Rapid deployment is important so that consumers do not have to wait for the benefits of the new services. To ensure rapid deployment, we have allocated two different sized spectrum blocks, which can be aggregated to form other block sizes. We have also altered the allocation of some of the PCS spectrum to reduce the cost of moving microwave incumbents that must be relocated. Both of these decisions will allow more rapid introduction of service because of the reduced costs of microwave relocation.

8. The revised band plan also will reduce the cost of service and equipment to consumers. In addition, we have increased the power level available for PCS service. Together with our decisions to license some BTAs and 10 MHz blocks, these changes will make PCS service more viable in rural areas, help ensure wide-area coverage and increase access for all Americans.

9. Many of the actions we take today are directed toward ensuring that a wide variety of applicants have an opportunity to acquire PCS licenses. In addition to providing for different spectrum blocks and geographic areas, we are modifying our ownership rules to encourage participation in PCS by rural telephone companies, small businesses and businesses owned by minorities and women.

---

[3] See 47 U.S.C. 309(j), as amended by Section 6002(a) of the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993).

10. The most significant of the changes that we adopt today involves modification of the band plan that was adopted in the Second Report and Order. In that Order, we allocated 120 MHz of spectrum to PCS, some of which was in the lower portion of the 2 GHz band allocated for emerging technologies and some of which was in the upper portion of that band. Under our revised plan, all of the 120 MHz of spectrum allocated to PCS is located in the lower band. The previous band plan would have required those who wished to operate in both the upper and lower bands to utilize more expensive dual mode handsets capable of operating on both bands. Providing PCS licenses in only the 1850-1990 MHz band will lower costs to consumers by permitting use of a single-band handset. Reducing the costs of equipment to consumers should also increase consumer demand and strengthen the economic viability of the PCS providers. Placing all the licensed and unlicensed spectrum in a single contiguous band also will decrease the cost of handsets that can operate in both licensed and unlicensed blocks. In addition, these changes will preserve spectrum in the upper band that is allocated internationally for the emerging Mobile Satellite Services (MSS) industry to provide worldwide service. Taken together, these changes will increase the competitiveness of PCS service providers in urban, suburban, and rural areas which should lower prices and stimulate demand, thereby increasing investment and economic growth. Lower prices will also enhance consumer access to PCS services.

11. Having all blocks in a single contiguous band also will increase the value of the 10 MHz blocks. These blocks would have been less desirable in the upper band because upper band equipment is expected to be available from manufacturers twelve or more months after lower band equipment. In addition, the upper band contains a higher concentration of microwave facilities that would have had to share spectrum with broadband PCS licensees or be relocated from the broadband PCS spectrum to avoid interference. Our action avoids the expense and potential delay associated with relocating the numerous microwave links currently operating in the upper band. The change we have made to the band plan also makes it more feasible to aggregate a 10 MHz block with a 30 MHz block for a total of 40 MHz. Taken together, these factors will reduce the time and the cost of PCS providers offering their services to the American public. The overall allocation of 120 MHz for broadband PCS remains unchanged.

12. In the Second Report and Order, we divided 120 MHz of spectrum into seven blocks: two 30 MHz blocks, one 20 MHz block, and four 10 MHz blocks. In this Order, we are amending our band plan to provide six blocks: three 30 MHz blocks and three 10 MHz blocks. We changed the 20 MHz block to a 30 MHz block and eliminated one 10 MHz block primarily because we were persuaded that a single 20 MHz block would not provide enough spectrum to support a viable competitor to the 30 MHz PCS MTA licensees, or to the two existing cellular licensees currently serving most areas. As a primary goal of our proceeding was to promote competitive delivery of PCS services, we believe that it is essential to make available an additional 30 MHz block. We anticipate that the three 10 MHz blocks will be used in a variety of ways that may include "niche services" and other functions, or as an enhancement for PCS or cellular providers that choose to purchase a 10 MHz block to complement a 30 MHz or 25 MHz block, respectively. Thus, our revised band plan provides

for an additional competitor to cellular service and to the other PCS providers, while also providing three 10 MHz blocks for multiple uses.

13. In addition to modifying our band plan, we also make significant amendments to the rules relating to participation in PCS by holders of cellular interests. In the Second Report and Order, we recognized that unfettered participation in PCS by cellular operators could lessen the potential competition that could develop between PCS and cellular systems. At the same time, we recognized that cellular licensees could foster rapid development of PCS for a variety of reasons, including their expertise with commercial mobile radio services. Promoting competition and providing for rapid deployment of PCS are both among the objectives that Congress instructed us to promote in Section 309(j) of the Communications Act, as amended by the Reconciliation Act. We have balanced those competing interests by allowing entities with a 20 or more percent investment interest in a cellular license to acquire a 10 MHz PCS license in the same area. We adhere to that decision. However, we have decided that as of January 1, 2000, we will afford cellular operators the same overall 40 MHz spectrum cap as other PCS operators, and allow them to acquire an additional 5 MHz for a total of 15 MHz of PCS spectrum in the same service areas as their cellular interests.

14. In Section 309(j), Congress also directed us to promote economic opportunity by disseminating licenses to a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women ("designated entities"). We are modifying our PCS cellular eligibility rules to promote that goal as well. Specifically, we are relaxing our cellular ownership attribution rules to allow designated entities with up to a 40 percent non-controlling interest in a cellular license to obtain a PCS license in the same area. One effect of this change will be to allow some rural telephone companies with non-controlling cellular interests, to provide PCS service in areas that might otherwise not be served in a timely manner.

15. We also are relaxing our cellular attribution rules to allow any entity with up to a 40 percent non-controlling ownership interest in a cellular license covering 10 percent or more of the population in a PCS service area to also attain a non-controlling, investment interest in a PCS license held by a business owned by minorities or women. While there is some risk that relaxing the cellular eligibility rule will limit the vigor of competition in some markets, we think that risk is sufficiently limited where the party holding interests in two licenses holds a minority interest in the cellular license and the PCS license is controlled by another entity. We have concluded that we should take that risk in order to advance the goal of promoting economic opportunity for these groups.

16. Our cellular eligibility rules balance the goals that Congress has established -- promoting competition, ensuring rapid deployment of PCS, and providing economic opportunity for designated entities. We have decided that limited participation by cellular providers will serve the public interest by promoting rapid deployment of PCS, participation by designated entities, and overall competition.

17. We have made a number of minor modifications to our rules. With these changes, we intend to proceed expeditiously toward licensing providers of broadband personal communications services. The following is a summary of all of the specific actions we take today to promote the goals outlined above:

a. Adopting a band plan that provides for three 30 MHz licenses (Blocks A, B, and C) and three 10 MHz licenses (Blocks D, E, and F), all of which are within the 1850-1990 MHz band;

b. Providing that the A and B Blocks be licensed within 51 service areas based on the Major Trading Areas (MTAs) and that the C, D, E, and F Blocks be licensed within 493 smaller service areas based on the Basic Trading Areas (BTAs) set forth in the Rand McNally Commercial Atlas & Marketing Guide (123rd ed. 1992);[4]

c. Maintaining the allocation of spectrum at 1910-1930 MHz for unlicensed PCS devices, and committing to initiate a proceeding in the near future to examine allocation of additional spectrum for unlicensed PCS operations. Within this band, we have adopted a 1.25 MHz channelization scheme for isochronous (voice) devices and eliminated channelization requirements for asynchronous (data) devices;

d. Continuing to permit all eligible entities to acquire spectrum up to a cap of 40 MHz;

e. Retaining our five percent equity attribution threshold for PCS licenses so that the same entity may not own more than five percent of PCS licenses constituting more than 40 MHz within the same area;

f. Retaining our cellular attribution threshold of 20 percent equity ownership of a cellular licensee and our service area overlap test of 10 percent of the population of the relevant PCS market, so that the same entity generally may not own more than 20 percent of the cellular license and more than 5 percent of PCS license(s) that would place the entity above the spectrum limit in an overlapping service area;

g. Relaxing the eligibility rules to permit entities with attributable interests in cellular companies whose combined cellular geographic service areas overlap between 10 and 20 percent of the PCS service area population to submit bids for more than 10 MHz of PCS spectrum provided that, prior to the auction, they commit to divest themselves of sufficient cellular interests to come into compliance with our eligibility rules within 90 days of license grant;

---

[4] Our current rules provide 492 service areas based upon BTAs. In response to a request we are dividing the Puerto Rico service area into two areas, infra.

h. Providing that voting stock, general partnership interests, interlocking directorates and certain other controlling interests and relationships will be considered in determining attributable interests under our spectrum caps;

i. Raising from a 20 percent to a 40 percent non-controlling interest the threshold for determining attributable cellular equity ownership for rural telephone companies, small businesses and businesses owned by minorities and women which are collectively termed "designated entities" under 47 U.S.C. 309(j);

j. Increasing from a 20 percent to a 40 percent non-controlling interest the threshold for determining attributable cellular equity ownership to allow non-designated entities to make non-controlling investments in PCS licenses owned and controlled by minority- and women- owned businesses;

k. Permitting entities with attributable cellular interests covering 10 or more percent of the population in a PCS service area to acquire 10 MHz of PCS spectrum within the PCS service area and, after January 1, 2000, to acquire an additional 5 MHz for a total of 15 MHz of PCS spectrum in their cellular service areas;

l. Relaxing construction requirements to provide that (a) 30 MHz broadband PCS licensees must provide coverage to one-third of their service area population within five years of initial licensing and two-thirds within ten years and (b) 10 MHz licensees must provide coverage to twenty five percent of their service area population within five years of initial licensing or, submit a showing of equivalent or substantial service;

m. Increasing the maximum power level permitted for broadband PCS base stations to 1640 watts equivalent isotropically radiated power (e.i.r.p.), which is equivalent to 1000 watts effective radiated power (e.r.p.);

n. Retaining with minor amendment rules ensuring compliance with minimum standards for exposure to radio frequency (RF) energy emitted by PCS devices;

o. Committing to initiate a proceeding in the near future to allocate additional spectrum for mobile satellite services (MSS) and to work toward having additional spectrum allocated to MSS at the World Radio Conference to be held in 1995 (WRC-95); and

p. Pledging to examine management contracts and spectrum leases in the CMRS docket for the purpose of determining whether other interests in PCS licenses should be limited in order to foster vigorous competition.

II. BACKGROUND

18. The Commission began its investigation of broadband PCS in 1989.[5] Since then the Commission has addressed broadband PCS in this docket by issuing a Notice of Inquiry, holding an En Banc meeting, and adopting a Policy Statement and Order, a Notice of Proposed Rule Making and Tentative Decision, and a Second Report and Order;[6] and held a Public Forum on broadband PCS.[7] We have also allocated 220 MHz of spectrum between 1850 and 2200 MHz for emerging technologies that include PCS;[8] provided for band sharing or negotiated relocation of microwave facilities occupying 2 GHz PCS spectrum;[9] provided spectrum to accommodate the existing 2 GHz facilities that relocated;[10] and adopted technical, licensing and auction rules for narrowband PCS.[11] We also considered 50 pioneer's

---

[5] Petitions for Rule Making requesting establishment of PCS were filed by Cellular 21, Inc., in September 1989, RM-7140; and PCN America, Inc. (PCN America), in November 1989, RM-7175. Subsequently, in February 1991, Apple, RM-7618, proposed that 40 MHz from the 1850-1990 MHz band be allocated for unlicensed high-speed local-area data communications services connecting personal computers.

[6] See Notice of Inquiry, GEN Docket No. 90-314, 5 FCC Rcd 3995 (1990); Policy Statement and Order, 6 FCC Rcd 6601 (1991); Notice of Proposed Rule Making and Tentative Decision, 7 FCC Rcd 5676 (1992); Erratum, 7 FCC Rcd 5779 (1992); and Second Report and Order.

[7] See FCC, Transcripts of PCS Public Forum, April 11-12, 1994 (Transcripts of the PCS Public Forum). The transcripts are available for public viewing at both the FCC Reference Center and the Library, 1919 M Street, N.W., Washington, DC. The transcripts also may be purchased from the Commission's duplication contractor.

[8] See First Report and Order and Third Notice of Proposed Rule Making, ET Docket No. 92-9, 7 FCC Rcd 6886 (1992).

[9] See First Report and Order and Third Notice of Proposed Rule Making, ET Docket No. 92-9, 7 FCC Rcd 6886 (1992); Second Report and Order, 8 FCC Rcd 6495 (1993); Third Report and Order and Memorandum Opinion and Order, 8 FCC Rcd 6589 (1993); Memorandum Opinion and Order, 9 FCC Rcd 1943 (1994), petition for further recon. pending.

[10] See Second Report and Order, ET Docket No. 92-9, 8 FCC Rcd 6495 (1993).

[11] See First Report and Order, GEN Docket No. 90-314 and ET Docket No. 92-100, 8 FCC Rcd 7162 (1993) (initial narrowband rules); Memorandum Opinion and Order, 9 FCC Rcd 1309 (1994) (adopting certain narrowband PCS rule amendments on reconsideration); Third Report and Order, PP Docket No. 93-253, FCC 93-98, released May 10, 1994 (design of narrowband auctions).

preference requests related to broadband PCS.[12] Finally, the Commission made recommendations and participated in an international allocation conference at which decisions were made that recognize and permit use of 2 GHz spectrum for PCS.[13] Numerous telecommunications companies and associations have actively participated in our PCS proceedings, and over 100 companies have applied for and received more than 220 experimental licenses to develop and test PCS services and technologies.

19. On August 10, 1993, the President signed the Omnibus Budget Reconciliation Act of 1993 (Reconciliation Act),[14] which amended Sections 3(n), 309(j) and 332 of the Communications Act of 1934, as amended (Communications Act).[15] Section 309(j) for the first time authorized the Commission to select licensees by competitive bidding and establishes objectives for the bidding process, including rapid deployment of new technologies, promotion of economic opportunity, competition and public access, wide dissemination of licenses, and efficient use of the spectrum. The Reconciliation Act also amended Sections 3(n) and 332 to provide that PCS is a mobile service and to establish a new framework for regulatory treatment of mobile services.

20. On September 23, 1993, shortly after the Reconciliation Act was enacted, the Commission adopted the Second Report and Order establishing regulations and policies for broadband PCS that are under review here. In the Second Report and Order, the Commission enumerated goals of competitive delivery, diversity of services, speed of deployment, and wide-area service. The Commission took a number of actions to help meet these goals.

---

[12] See Third Report and Order, 9 FCC Rcd 1337 (1994), recon. pending, appeal pending sub nom. Pacific Bell v. FCC, No. 94-1148 (D.C. Cir., filed March 1, 1994). We intend to address shortly the petitions for reconsideration of our pioneer's preference decisions.

[13] A worldwide allocation for PCS was discussed at the 1992 International Telecommunication Union (ITU) World Administrative Radio Conference (WARC-92) in Torremolinos, Spain. The conference decided to maintain primary fixed and mobile allocations at 2 GHz in Region II (which includes the United States), and to make additional primary mobile-satellite service allocations in the 1930-2010 and 2120-2200 MHz bands. It added a footnote stating that future public land mobile telecommunications systems, similar in concept to PCS, are expected to use the 1885-2025 MHz and 2110-2200 MHz bands on a worldwide basis. See Report, GEN Docket No. 89-554, 6 FCC Rcd 3900 (1991); ITU, Final Acts of the World Administrative Radio Conference for Dealing with Frequency Allocations in Certain Parts of the Spectrum (Malaga-Torremolinos, 1992).

[14] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, §§ 6002(b)(2)(A), (B), 107 Stat. 312, 392 (1993).

[15] 47 U.S.C. §§ 3(n), 309, 332.

Specifically, the Commission:

a. Defined PCS as "radio communications that encompass mobile and ancillary fixed communication that provide services to individuals and businesses and can be integrated with a variety of competing networks";[16]

b. Allocated spectrum at 2 GHz for PCS, including 120 MHz of spectrum for licensed broadband PCS and 40 MHz for unlicensed PCS devices;

c. Provided for two 30 MHz licenses and one 20 MHz license in the "lower" band of the emerging technologies spectrum, and four 10 MHz licenses in the "upper" band, in each geographic area;

d. Provided that the two 30 MHz licenses would be authorized within 51 service areas based on the Rand McNally Major Trading Areas (MTAs) and that the 20 MHz and 10 MHz licenses would be authorized within 492 service areas based on the Rand McNally Basic Trading Areas (BTAs);[17]

e. Established eligibility requirements that limit entities with certain cellular interests to 10 MHz of PCS spectrum where there is significant overlap between a PCS service area and the cellular service area (i.e., 10 percent or more of the PCS service area population);

f. Limited broadband PCS licensees to 40 MHz of spectrum, and established certain licensing and renewal mechanisms;

g. Established a maximum power level of 100 watts e.i.r.p. for PCS base stations, and adopted technical specifications to avoid harmful interference to other operations while leaving maximum technical flexibility to permit development of new technologies;

h. Adopted rules to minimize radio frequency (RF) exposure risk; and

i. Noted an intent to continue participating in international efforts to provide standards and consistent spectrum allocations for international deployment of worldwide terrestrial mobile and global satellite services.

---

[16] Second Report and Order, ET Docket No. 92-9, 7 FCC Rcd 6886 (1992) at App. A, § 99.5.

[17] See Rand McNally, Inc., 1992 Commercial Atlas & Marketing Guide 38-39 (1992).

21. In related proceedings, the Commission provided a transition plan to govern PCS licensees sharing their authorized spectrum with existing 2 GHz fixed microwave facilities or relocating those facilities to other spectrum;[18] determined that broadband PCS presumptively will be classified as a commercial mobile radio service under Section 332 of the Communications Act as amended by the Reconciliation Act;[19] and found that broadband PCS is within the Commission's competitive bidding authority, when it adopted generic competitive bidding rules and procedures.[20] With regard to competitive bidding for broadband PCS licenses, the Commission proposed to set aside two blocks of spectrum -- the 20 MHz block (Block C) and a 10 MHz block (Block D) -- that would be reserved for bidding purposes to "designated entities", (small businesses, rural telephone companies and businesses owned by members of minority groups and women), and proposed other measures to ensure economic opportunity for designated entities.[21] These proposals remain pending. The proposed set-aside and other outstanding issues concerning broadband PCS auctions will be decided in a forthcoming Order (in PP Docket No. 93-253) addressing competitive bidding rules.

22. In response to the Second Report and Order, 67 parties filed petitions requesting reconsideration or clarification. Of the 67 petitions, 58 primarily address issues relating to licensed PCS services and 9 primarily address issues relating to unlicensed PCS operations. The petitioners collectively request reconsideration of the spectrum allocation and frequency block plan, eligibility and attribution matters, construction requirements, technical standards, microwave interference criteria, power limits, radio frequency (RF) hazard requirements, and matters related to unlicensed PCS devices. The Commission received comments addressing the petitions for reconsideration from 44 parties and replies from 54 parties.

23. On March 17, 1994, the Commission established an intra-agency task force to coordinate the reconsideration of PCS policies and rules. On April 11 and 12, 1994, the task force conducted a series of public panel discussions on PCS issues. The panelists included potential PCS service providers, technical experts, members of the financial community, economists and representatives of designated entities. The presentations of the panelists and transcripts of the panel discussions were placed in the record of this proceeding, and 30 interested parties filed statements in the record responding to the panel discussions.

---

[18] See First Report and Order and Third Notice of Proposed Rule Making, ET Docket No. 92-9, 7 FCC Rcd 7997 (1992).

[19] Second Report and Order, GN Docket No. 93-252, 9 FCC Rcd 1411, 1423 (1994) (CMRS Second Report and Order), recon. pending.

[20] See Second Report and Order, PP Docket No. 93-253, FCC 94-61, released April 20, 1994. (competitive bidding rules).

[21] See Notice of Proposed Rule Making, PP Docket No. 93-253, 8 FCC Rcd 7635, 7655 (1993); Second Report and Order at n.61.

III. SPECTRUM ISSUES AND SERVICE AREAS

A. Allocation, Block Plan and Service Areas.

24. In the Second Report and Order, the Commission allocated 120 MHz for licensed PCS and 40 MHz for unlicensed PCS from the 220 MHz of emerging technologies spectrum.[22] Specifically, (lower band) 1850-1890 MHz and 1930-1970 MHz, and the (upper band) 2130-2150 MHz and 2180-2200 MHz, were allocated for licensed PCS; and the 1890-1930 MHz band was allocated for unlicensed PCS devices. In addition, 60 MHz remained in reserve for future allocations to emerging technologies such as MSS or other applications. The frequency plan for licensed PCS included two 30 MHz frequency blocks, one 20 MHz block, and four 10 MHz blocks. Service areas were defined based on Rand McNally's "Major Trading Areas" (MTAs) and "Basic Trading Areas" (BTAs).[23] The two 30 MHz blocks were in the lower band and licensed on an MTA basis; the 20 MHz block also was in the lower band, but licensed on a BTA basis; and the four 10 MHz blocks were in the upper band and licensed on a BTA basis.[24]

---

[22] See "PCS Band Plan" chart attached as Appendix D.

[23] See Rand McNally, Inc., 1992 Commercial Atlas & Marketing Guide 38-39 (1992) ("BTA/MTA Map"). Rand McNally organizes the 50 states and the District of Columbia into 47 MTAs and 487 BTAs. The BTA/MTA Map is available for public inspection at the Office of Engineering and Technology's Technical Information Center, Room 7317, 2025 M Street, N.W., Washington, D.C. 20554. For PCS licensing purposes, the Commission adopted service areas that separated Alaska from the Seattle MTA and added five insular areas: Puerto Rico, U.S. Virgin Islands, Guam, Northern Mariana Islands, and American Samoa. In our rules, the insular areas are treated as five BTA service areas and three MTA service areas. See Section 24.102 of the Commission's Rules. Additionally, a listing of counties, parishes, and census divisions that constitute each BTA and MTA is available for inspection at the Technical Information Center. This is a listing of Rand McNally's 47 MTAs and 487 BTAs, and therefore, the census divisions of Alaska are listed within the Seattle MTA and the insular areas are not listed.

[24] Some parties opposed the use of the Rand McNally MTAs and BTAs for PCS service areas. AIDE Comments at 10-15; FCBA Replies at 1-6; GTE Comments at 13-14; Hill & Welch Comments at 4-8; Killen Petition at 1-3; NTCA Petition at 2-3; PacBell Comments at 6-8; Point Petition at 3; UTC Petition at 3, 6; and PCIA Petition at 16-18. The principal objection was the use of proprietary and copyrighted material to define service areas for PCS. On February 15, 1994, a blanket licensing agreement was reached between PCIA, on behalf of PCS entities, and Rand McNally. This agreement permits all interested persons to use Rand McNally's copyrighted material for purposes of PCS licensing, building, marketing and operating. As a result of this agreement, PCIA asked to delete from its Petition for Reconsideration all issues related to the use of Rand McNally's MTA/BTA service areas and the objections of the other parties appear to have been resolved by this agreement. We

25. Twenty-eight parties argue for reconsideration of various aspects of the allocation and frequency block plan adopted in the Second Report and Order.[25] In general, the petitioners address: 1) alternatives for the PCS frequency block plan, including the number of PCS providers, PCS service areas, and issues relating to the aggregation or subdivision of PCS spectrum; 2) whether spectrum should be designated for private PCS use; and 3) the impact of the PCS allocation on the international allocations for mobile satellite service (MSS).

26. We are revising the band plan to move the 10 MHz blocks from the upper band to the lower band, increase the size of the 20 MHz block to 30 MHz, and reduce the number of 10 MHz blocks from four to three. The revised band plan is depicted in Appendix D, "Broadband PCS Band Plan," and detailed in the following table.

Frequency Block	Amount of Spectrum	Geographic Scope	Frequency Range
A	30 MHz	MTA	1850-1865/1930-1945 MHz
B	30 MHz	MTA	1870-1885/1950-1965 MHz
C	30 MHz	BTA	1895-1910/1975-1990 MHz
D	10 MHz	BTA	1865-1870/1945-1950 MHz
E	10 MHz	BTA	1885-1890/1965-1970 MHz
F	10 MHz	BTA	1890-1895/1970-1975 MHz
Unlicensed	20 MHz	Nationwide	1910-1930 MHz

27. This plan provides for three large blocks and three small ones. This will allow potential licensees to aggregate varying amounts of spectrum in different geographic areas depending on their individual business plans. The three large 30 MHz blocks ensure that

---

therefore consider the copyright issues related to using MTA/BTA service areas to be resolved.

[25] See Alliance Reply at 2-4; APCO Petition at 6; Bell Atlantic Petition at 3; BellSouth Petition at iii; Columbia Petition at 1-3; Comcast Petition at 15-16; Comsat Petition at 15-22; CTIA Petition at iii; DWMP Petition at 3; Florida Cellular Petition at 4; Killen Petition at 1-3; Murray Petition at 4-8; INS Petition at 6; McCaw Petition at 7; NTCA Petition at 2-3; Nextel Petition at 5; NYNEX Petition at 3, 6-11; PacBell Petition at 2; PCS Action Petition at 3, 9-10; Pegasus Petition at 1-2; PNSC Petition at 5; Point Petition at 1-2; RCA Petition at 2, 7-8; TDS Petition at 2; Time Warner Petition at 2-7; TRW Petition at 2; Intelco Petition at 3-6; and UTC Petition at 2-6.

these licensees have sufficient spectrum to begin service rapidly. The three small 10 MHz licenses will allow the provision of services that might not require a full 30 MHz, or for aggregation with a 30 MHz PCS license or an existing cellular license. As noted above, moving the 10 MHz blocks from the upper band to the lower band provides a number of important procompetitive benefits: consumer equipment costs will be significantly lower, costs of relocating incumbent fixed microwave links will be significantly reduced for new PCS entrants, the ability to aggregate spectrum will be increased, and valuable spectrum will be preserved that can be used to provide mobile satellite service on a worldwide basis. This revised plan reduces the amount of spectrum for unlicensed devices, but will increase the ability of new consumer equipment to work on both a licensed and unlicensed basis, increasing the utility of the devices for consumers. The improvement in this band plan will increase competition, lower equipment costs and provide other benefits. As a result, consumers will receive lower-cost and higher-quality service.[26]

1. Block Positioning

28. NYNEX proposes that the number of licenses and size of the frequency blocks be maintained, but that the 20 MHz block be switched to the upper band and that two of the 10 MHz blocks be switched to the lower band and located between the two 30 MHz blocks.[27] NYNEX states that this would facilitate aggregation of up to 40 MHz in the lower band because both 30 MHz MTA blocks would be adjacent to a 10 MHz BTA block. It states that this arrangement of the frequency blocks would be especially helpful to cellular licensees who are limited to 10 MHz in-market, but can aggregate up to 40 MHz out-of-market. NYNEX states that this approach would allow a cellular carrier to purchase licenses only in the lower PCS band so that its customers would not need handsets that operate in both the upper and

---

[26] In the Second Report and Order, the Commission declined to allocate additional support spectrum to connect PCS cell sites. We found that fixed service spectrum already allocated in other bands is adequate to support such PCS backhaul operations. The Commission also noted that some of these support operations can be provided through facilities that do not require use of radio spectrum, such as fiber optic cable. APC, in its comments to the petitions for reconsideration, requests that we allocate at least a portion of the 38 GHz band specifically for PCS backhaul operation. See APC Comment at 23-24. We continue to believe that the spectrum already allocated for fixed microwave services is adequate to support PCS operations and will not allocate additional spectrum at this time. We do recognize, however, that it is important that PCS operations have access to adequate support spectrum. Accordingly, we will henceforth examine more closely requests for use of the 38 GHz band to ensure that such requests are justified and that the spectrum is used efficiently.

[27] Appendix B lists parties that filed petitions for reconsideration, oppositions or comments, and replies. Abbreviations for parties used throughout this Memorandum Opinion and Order are indicated in this appendix.

lower bands. NYNEX states that, while it is possible to design equipment that can work in both the lower and upper PCS bands and the cellular bands, such "interoperable" handsets would result in increased equipment cost, size, weight, and power consumption.[28]

29. INS proposes two 30 MHz and two 10 MHz blocks in the lower band and one 30 MHz and one 10 MHz block in the upper band. It states that this plan would increase the opportunity for designated entities to aggregate 40 MHz because the current frequency plan encourages designated entities to bid on three different blocks (one 20 MHz and two 10 MHz blocks). INS agrees with NYNEX that use of spectrum in both bands would result in higher per unit capital costs and indicates that this is of particular importance to small businesses.

30. Bell Atlantic states that six 20 MHz blocks would eliminate the need for costly and inefficient aggregation of licenses between the lower and upper frequency bands. CTIA states that the plan adopted in the Second Report and Order will force licensees in the lower band to aggregate with the 10 MHz frequency blocks in the upper band if their systems require more than 20 or 30 MHz and contends that this approach requires complex and expensive equipment capable of operating in both bands.[29]

31. MSS providers argue that the location of the PCS allocations located in the upper band spectrum nullifies the International Agreement on Global MSS allocations. They propose combining all 120 MHz of licensed PCS in a single block below 2 GHz.[30]

32. Motorola discussed a plan to move all of the PCS spectrum to the lower band in ex parte presentations. They note that their plan gives the Commission the flexibility to allocate three 30 MHz and three 10 MHz licenses in the lower band. Motorola argues that bidders would be able to aggregate licenses without the need for dual band equipment.

33. A number of parties filed comments and ex parte presentations which also discuss the benefits of placing all of the licensed PCS spectrum in a contiguous band. These benefits include lower equipment costs and lower microwave relocation costs. In addition, some stress the increased ability of a provider to have spectrum in the same band in different service areas to provide competitive service.[31] Other parties discuss the desirability of having 10 and 30 MHz blocks in the same band as the 30 MHz blocks to facilitate aggregation.[32]

---

[28] See NYNEX Petition at 3.

[29] See CTIA Petition at iii, 3-5.

[30] See MSS Industry Spectrum Coalition Briefing for PCS Task Force at 1-5 (April 14, 1994).

[31] See e.g., MCI Comments at 5.

[32] See NYNEX Comments at 2.

34. Decision. We initially authorized 10 MHz blocks in the upper PCS band. Many parties, however, argue that the upper band blocks would be of little value in the near term because equipment would not be developed for this spectrum for a year or more.[33] In addition, handsets that can bridge the upper and lower bands are predicted to cost about 25 percent more and to be bulkier than handsets operating only on the lower frequencies.[34] In addition, dual mode handsets would be heavier and have shorter battery life. Several parties argued that dual band handsets were essential to the success of upper band service because PCS operators would be likely to aggregate upper and lower band spectrum and consumers would want to be able to receive service on both bands, both to permit roaming across geographic areas and to facilitate changing service providers.[35] These parties contended that the higher costs, delay, and other limitations associated with the upper band presented serious impediments to achieving our goals of fostering a competitive market, rapid deployment, opportunities for designated entities, and fostering a wide diversity of services. Upon reconsideration, we conclude that MSS and PCS services can both be accommodated by using only lower band spectrum for licensed and unlicensed PCS services.

35. Moving licensed PCS from the upper band to the lower band provides a number of procompetitive benefits. First, the cost of interoperability between licensed and unlicensed PCS will be reduced. As noted above, equipment costs to consumers are predicted to be reduced by 25 percent. Moreover, under the revised plan, manufacturers will concentrate on a single band with uniform frequency spacing, which should result in greater economies of scale in manufacturing that reduce consumer equipment prices. This additional cost for interoperability between bands was not evident to us when we made our earlier decision. Increased interoperability has the additional benefit of reducing lock-in costs for consumers, giving them greater ability to switch providers, and thereby resulting in a more competitive market. Because of the less expensive handsets and the ability to combine adjacent blocks, aggregation is much more desirable. This will benefit all new providers, including designated entities, because they will be able to reduce costs and compete more effectively. Furthermore, there appear to be a number of different potential uses for the 10 MHz blocks: innovative niche services that are unlikely to be provided initially on the 30 MHz blocks, aggregation with the 30 MHz blocks, aggregation with other 10 MHz blocks, service extensions for incumbent cellular providers, and opportunities for designated entities to provide service with lower capital cost. Moving the 10 MHz blocks from the upper band to the lower band will enhance the value of some, if not all, of these uses and allow licensees to decide the most valuable use for the spectrum.

---

[33] See e.g., NYNEX Petition at 3.

[34] See Transcripts of the PCS Public Forum at 247-249 (April 12, 1994); Letter from Motorola to the FCC at 2 (May 25, 1994); Letter from Concord to the FCC at 1 (May 31, 1994); Letter from Northern Telecom to the FCC at 1 (June 1, 1994).

[35] See Murray Petition at 7-8; PCS Action Petition at 2.

36. Second, the cost and time required to relocate incumbent fixed microwave links should be significantly less in the lower band because the number of microwave links in the upper band is higher than the number in the lower band.[36] While the bandwidth used by the upper band microwave incumbents is much less, making it easier to find some clear spectrum immediately, the ultimate requirement to clear the spectrum would result in significantly higher costs for PCS licensees.

37. Third, equipment should be available for the lower band at an earlier date. Manufacturers have spent significant time and resources developing lower band equipment but the record indicates that they have not done much work on developing equipment for the upper band. As a result, some parties assert that the availability of upper band equipment trails the availability of lower band equipment by about one year.[37] Time to market is a critical factor in the rollout of PCS services that will compete against existing cellular and enhanced specialized mobile radio (ESMR) entities. Thus, earlier equipment availability is a significant factor in developing a competitive PCS service.

38. Fourth, many cellular companies have expressed a desire to operate PCS systems both outside and inside their current cellular service areas.[38] By moving the PCS spectrum to the lower band, PCS and cellular providers will have the ability to provide service over a large geographic area even though they desire (or are required) to have different amounts of PCS spectrum in different areas. This capability could lower costs to the benefit of consumers because cellular companies will be able to compete using PCS spectrum inside and outside of their service areas.

39. Finally, as we discuss infra, moving all the PCS spectrum to the lower band will better meet the needs of the emerging MSS industry. We also believe that this action will increase the value of the unlicensed spectrum because interoperability with licensed PCS will increase.

40. Accordingly, we find that moving all of the PCS spectrum to the lower band will increase competition, reduce both consumer equipment and system costs, and increase equipment functionality. This new band plan has significant industry support, as evidenced by numerous recent filings submitted in the record by a variety of interests supporting Motorola's proposal to move all of the PCS spectrum to the lower band.[39]

---

[36] See Transcripts of the PCS Public Forum at 145 (April 12, 1994).

[37] See Letter from PCS Action to the FCC (March 23, 1994).

[38] See e.g., NYNEX Petition at 3.

[39] See Letter from Motorola to the FCC (May 25, 1994); Letter from MCI to the FCC (May 26, 1994); Letter from Northern Telecom to the FCC (June 1, 1994); Letter from MSS Spectrum Coalition to the FCC (May 27, 1994); Letter from U.S. West to the FCC (June 1,

2. Block Size

41. In developing our original plan, we concluded that 10 MHz blocks could support viable and competitive PCS services through the use of advanced digital techniques, such as Code Division Multiple Access (CDMA) and Time Division Multiple Access (TDMA), and microcellular technology. We also stated that some types of PCS operations would require more than 10 MHz of spectrum. In addition, we recognized that initially PCS is required to share spectrum with fixed microwave operations and therefore the full amount of spectrum will not be available initially in many locations. We concluded that 20 and 30 MHz frequency blocks were needed to support the rapid development and implementation of the fullest range of PCS services. We also permitted most licensees to aggregate up to 40 MHz of broadband PCS spectrum in each service area, except that cellular licensees were limited to 10 MHz where their cellular geographic service area (CGSA) overlapped with the PCS service area. For these reasons, we concluded that the combination of 10, 20, and 30 MHz licenses would allow users to acquire the amount of spectrum appropriate for their applications.

42. In its petition, Time Warner requests that we allocate 40 MHz per PCS license. Time Warner argues that 40 MHz blocks are needed to share the PCS frequencies with fixed users and that allowing aggregation does not adequately remedy the problems caused by licensing blocks smaller than 40 MHz. Time Warner states that under current PCS rules, the only way for a licensee to aggregate 40 MHz is to aggregate across the lower and upper bands, which would necessitate the use of subscriber equipment that is larger and more expensive.[40] Alternatively, INS proposes that we divide the PCS spectrum into three 30 MHz and three 10 MHz blocks, arguing that this facilitates aggregation of spectrum without crossing between the bands and will enable designated entities to obtain a 30 MHz block in the lower band.[41]

43. Several parties express support for alternative plans based on blocks of equal size.[42] Bell Atlantic, BellSouth, Florida Cellular, Point, and TDS urge that we allocate six 20 MHz blocks (four 20 MHz blocks in the lower band and two 20 MHz blocks in the upper

---

1994); Letter from OPATSCO to the FCC (June 2, 1994); Letter from CTIA to the FCC (May 27, 1994); Letter from Concord to the FCC (May 31, 1994); Letter from Pacific Telesis to the FCC (May 27, 1994); Letter from APC to the FCC (June 2, 1994).

[40] See Time Warner Petition at 2.

[41] See INS Petition at 6.

[42] In his petition, Murray requested allocation of all broadband PCS spectrum in 10 MHz blocks and licensed in BTA license areas. In his comments, however, Murray indicates that although he still favors 10 MHz licenses, a move toward uniformity (in channel blocks of 20 MHz) would be a improvement over the plan adopted.

band).[43] Bell Atlantic states that the net efficiency and capacity gain in moving from four 10 MHz to four 20 MHz blocks greatly outweighs the slight efficiency loss from reducing the two 30 MHz allocations to 20 MHz. Florida Cellular states that equal-sized blocks would provide a "more equitable playing field" for small businesses. Other commenters, especially smaller companies and associations representing the interests of smaller groups, support the principle that competition will be increased if we allocate blocks of equal size.[44]

44. Point submits that a 20 MHz block is more than enough spectrum to create a viable PCS service, arguing that digital technology permits a provider with 20 MHz to serve the entire population in all but the very largest markets. It argues that in a marketplace comprised of two cellular carriers, one wide-area specialized mobile radio (SMR) carrier, and from two to six viable PCS carriers, no single carrier could expect to achieve more than a 30 percent market share. Point concludes that a 20 MHz block is more than sufficient to serve 30 percent of the total population even in the largest markets.[45]

45. CTIA and Nextel propose four 20 MHz blocks in the lower band and four 10 MHz blocks in the upper band. CTIA and Nextel argue that digital technology offers unprecedented customer capacity and that the record does not identify any PCS service requiring as much as a 30 MHz block. Nextel states that 10 and 20 MHz blocks are sufficient to permit engineering around unrelocated microwave systems while encouraging the use of spectrally-efficient technologies.[46] Additionally, CTIA states that 30 MHz blocks make coordination with microwave incumbents more difficult than the 20 MHz blocks because incumbent microwave users generally have 20 MHz channels.

46. PacBell urges that we reduce the number of blocks (and PCS licensees). In particular, PacBell argues that, given two established cellular providers and one SMR competitor, a maximum of three new PCS providers would be viable even in the largest metropolitan areas.[47]

47. AMT/DSST, in joint comments, submit that the adopted frequency plan should not be altered. AMT/DSST argue that the petitioners reflect no consensus on the appropriate direction to be taken by the Commission on reconsideration. They state that the 10 MHz licenses will facilitate the provision of specialized or "niche" applications and that such

---

[43] See Bell Atlantic Petition at 3; BellSouth Petition at 17; Florida Cellular Petition at 4; Point Petition at 2; TDS Petition at 2.

[44] See Murray Petition at 4-8.

[45] See Point Petition at 2.

[46] See Nextel Petition at 5-8.

[47] See PacBell Petition at 2.

specialized applications and services will not be offered by PCS providers operating on the larger blocks and expecting to compete with incumbent cellular providers. AMT/DSST also state that the two 30 MHz blocks will foster the rapid introduction of PCS services with system capacities comparable to cellular system capacities. In the view of AMT/DSST, the current plan represents a "reasoned balancing of the regulatory, policy and technical considerations that have received a full airing in this Docket."[48]

48. GCI states that, while it would have preferred fewer blocks, each with a greater amount of spectrum, the current frequency plan should not be revised. It states that the diversity of arguments for different block sizes demonstrates that a diversity of services may result from the allocation of spectrum blocks of varying size. Further, GCI believes that cellular providers will combine 10 MHz of PCS spectrum with their existing allocation of 25 MHz. GCI therefore believes it important to provide PCS licensees with 30 MHz so that new entrants can compete with cellular providers.[49]

49. A number of responding parties argue strongly that the current plan should not be amended to eliminate 30 MHz blocks in favor of smaller blocks. For example, APC states that the 30 MHz blocks are necessary to permit licensees to share spectrum with microwave users, to enable PCS to compete with the wired local loop, and to facilitate the provision of high-speed data broadband and information services. APC believes that entities favoring smaller spectrum blocks hope to place PCS providers at a competitive disadvantage to cellular and wide-area SMR operations.[50] PCS Action similarly argues that large spectrum blocks and geographic areas will enable independent PCS operators to be competitive sooner with the existing mobile communications providers.[51] US West believes that 30 MHz is necessary to support new entrants.[52] MCI submits that smaller blocks would increase the costs and delays associated with the development of a broadband wide area PCS system. MCI believes that smaller blocks would be inefficient and would require new entrants to resort to the secondary market to obtain the spectrum necessary to compete with other mobile communications providers.[53]

---

[48] See AMT/DSST Comments at 2-8.

[49] See GCI Comments at 3-5.

[50] See APC Comments at 13.

[51] See PCS Action Comments at 3-9.

[52] See US West Petition at 9-12.

[53] See MCI Comments at 2-3, 5.

50. Bell Atlantic, CTIA, Nextel, and Sprint oppose Time Warner's proposal for 40 MHz blocks, arguing that such a large amount of spectrum would permit too much concentration of control and discourage participation by designated entities, who will tend to be smaller than other PCS providers.[54]

51. At the PCS Public Forum held on April 11 and 12, 1994, and in comments filed in response to those discussions, many of the parties supported 30 MHz blocks. For example, Mark Roberts of Alex Brown & Co. stated that PCS entrants will need large blocks of spectrum to be able to compete efficiently and to operate with a cost structure similar to that of cellular providers that already have 25 MHz. He further argued that license sizes of less than 30 MHz would be likely to lock in premium returns for the cellular industry.[55] Paul Rissman of Alliance Capital stated that the financial community would be interested in PCS only if large spectrum blocks are created.[56] Daniel Kelley of Hatfield & Associates stated that, given the spectrum clearing problems, 30 MHz would be about the minimum amount of spectrum needed for a PCS provider to compete with incumbent cellular providers.[57] Other participants at the public meeting, including George Murray, Dr. Charles Jackson, and Dr. Jerry Hausman, expressed the view that 20 MHz blocks would be sufficient for the provision of PCS service and that by allocating 20 MHz blocks the Commission could facilitate aggregation to 40 MHz if some providers felt that was necessary.[58]

52. Decision. In the Second Report and Order, we allocated two 30 MHz blocks, one 20 MHz block and four 10 MHz blocks. Our intent was to encourage participation of as many viable new PCS entrants as possible while maintaining sufficient spectrum to ensure the viability of both MSS and unlicensed devices. Based on the reasoning presented below, and on information provided by the petitioners and other responding parties, including presentations made by industry experts at our panel discussions, we find that our goals will be better served by two modifications to the band plan: (a) an increase in the size of the 20 MHz block to 30 MHz; and (b) a reduction in the number of 10 MHz blocks from four to three. Overall, the total amount of spectrum allocated for licensed PCS remains unchanged.[59]

---

[54] See Bell Atlantic Comments at 4-5; CTIA Comments at 12; Nextel Comments at 10-12; Sprint Comments at 4.

[55] See Transcripts of the PCS Public Forum at 439 (April 11, 1994).

[56] See Transcripts of the PCS Public Forum at 441-449 (April 11, 1994).

[57] See Transcripts of the PCS Public Forum at 251-252 (April 11, 1994).

[58] See PCS Public Forum transcript at 111 (April 12, 1994) (Murray), 28 (April 12, 1994) (Jackson), and 353 (April 11, 1994) (Hausman).

[59] See "PCS Band Plan" attached as Appendix D.

53. One of our goals in this proceeding is to stimulate competition in the wireless and wireline industries, thus reducing costs and improving quality for consumers. In so doing, we must balance two objectives. First, we want to maximize the number of opportunities for new viable competitors to emerge. We also want to allow market forces to guide how many competitors survive. We have endeavored to provide as many opportunities as possible to aggregate blocks into viable service offerings to ensure that several strong competitors emerge to provide service. Our desire to maximize competition must be tempered, however, because 1) spectrum is limited and 2) for new entrants to be viable we must provide sufficient spectrum to begin service quickly with reasonable upfront capital costs. We believe that the combination of microwave incumbents occupying part of this spectrum and economies of scale lead to the conclusion that the a set of three 30 MHz blocks will support the rapid introduction of competitive PCS services whereas 20 MHz blocks could lead to PCS service start-up delays or a reduction in the number of viable competitors.

54. We believe that our new band plan is superior to uniform 20 MHz blocks, as advocated by Bell Atlantic, BellSouth, Florida Cellular, Point and TDS.[60] The combination of three 30 MHz blocks and three 10 MHz blocks allows the aggregation of a variety of license sizes that could not occur with uniform 20 MHz blocks.[61] As a result, we find that the allocation of six 20 MHz blocks would not provide as many benefits as either the allocation adopted in the Second Report and Order on the modified plan we adopt in this order and it might lead to fewer new service providers with sufficient spectrum to provide service quickly. We also reject the plan of twelve 10 MHz blocks proposed by Murray, because such an arrangement might seriously delay the implementation of PCS, since the process of aggregating so many spectrum blocks could be time consuming and costly.[62] It also could dramatically increase complexity and transaction costs at and after the auction. Finally, we believe that dividing the spectrum into 40 MHz blocks as requested by Time Warner would be inefficient for many applications and would foreclose innovative niche services.

55. The record indicates significant concern that a 20 MHz block may not provide sufficient spectrum to enable a PCS provider to compete effectively with other PCS licensees operating on 30 MHz spectrum blocks or with other commercial mobile radio service providers. Some parties argue that 20 MHz will provide sufficient capacity in the long run.[63] However, APC argues that with only 20 MHz, there could be a significantly larger portion of

---

[60] See Bell Atlantic Petition at 3; BellSouth Petition at 17; Florida Cellular Petition at 4; Point Petition at 2; TDS Petition at 2.

[61] We also believe that fewer new viable PCS competitors might emerge under the six blocks of 20 MHz plan, given a spectrum aggregation limit of 40 MHz and the head start of cellular incumbents.

[62] See Murray Petition at 4-8.

[63] See Point Petition at 2; Nextel Petition at 5-8.

each service area where the licensee has no usable spectrum due to the presence of microwave incumbents.[64] The presence of fixed microwave links requires that, on the average, a licensee with 20 MHz initially will have to relocate more microwave links than a 30 MHz license before PCS service can begin, which could significantly delay the commencement of service and increase the upfront cost of initiating service. In addition, APC states that the ability of a microwave incumbent to delay or extract a premium for relocating its link because its microwave path fully blocks service diminishes significantly with a 30 MHz spectrum block.[65] While incumbent microwave links are 20 MHz wide, we feel that the advantages of being able to work around specific links with a 30 MHz block outweigh the additional transaction costs which result from not matching the incumbent fixed microwave assignments identically.

56. Other parties support the notion that a 30 MHz block will help new PCS entrants compete more effectively with existing wireless and wireline providers.[66] We also believe that limiting one licensee to 20 MHz could be a disadvantage for future competition. The ability to provide a complete package of mobile voice and data services could become a significant competitive advantage in the future. Such a package of wireless services, however, may require more than 20 MHz of spectrum.[67] Other services may require less spectrum and are better suited to the 10 MHz blocks.

57. Due in large part to these concerns, the investment community has stated that financing would be much more difficult to obtain for the licensees on the 20 MHz block than on the other blocks.[68] These handicaps are of particular concern to us because the 20 MHz block was proposed to be reserved for designated entities.[69] The competitive handicaps of a 20 MHz block relative to 30 MHz blocks would not have served our goal of providing a viable competitive opportunity for designated entities.

---

[64] See APC Comments at 11.

[65] See APC Comments at 10.

[66] See PCS Action Comments at 4; INS Petition at 6; Letter from PacBell to the FCC (April 28, 1994).

[67] See PCS Action Comments at 4.

[68] See Transcripts of the PCS Public Forum at 439-449 (April 11, 1994).

[69] In the Notice of Proposed Rule Making in the competitive bidding proceeding, PP Docket No. 93-253, 8 FCC Rcd 7635 (1993) (competitive bidding), the Commission indicated that it would consider setting aside Blocks C and D for small businesses, rural telephone companies, and businesses owned by minorities or women. Reconciliation Act § 6002(a), 107 Stat. at 389. See H.R. Rep. No. 103-213, 103d Cong., 1st Sess. at 482-484 (1993) (Conference Report); H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 255 (1993).

58. Increasing the third license from a 20 MHz block to a 30 MHz block appears to eliminate any competitive disadvantages stemming from the band plan. The A, B and C blocks each will have a roughly equivalent portion of its service area completely blocked by incumbent microwave users in any geographic area. As a result, the costs and delay due to incumbent relocation should be similar on each of the blocks. This change should also reduce the difficulty faced by the C block licensee in obtaining financing. We conclude, therefore, that three equal sized 30 MHz blocks will facilitate competition and the rapid development and implementation of the fullest range of PCS services and ensure that PCS is more fully competitive with other mobile radio services. Accordingly, we are changing the single 20 MHz license to a 30 MHz license.

59. Time Warner petitioned us to allocate 40 MHz blocks in order to promote rapid introduction of service and to enhance the ability a wide range of services in competition with existing wireless and wireline providers.[70] While we believe that some new entrants may need to acquire 40 MHz to fully realize their business plans, requiring all applicants to purchase 40 MHz in all areas would not serve our goal of giving potential licensees the ability to determine the amount of spectrum they need for particular services, nor would it maximize competition. Companies that desire to provide service using 40 MHz can do so through aggregation at the auction or afterwards. Providing a combination of 30 MHz and 10 licenses MHz provides the benefits of 40 MHz licenses, without restricting the options of firms nor affecting competition.

60. Consistent with our decision to formulate a flexible definition of PCS, we allocated four 10 MHz blocks in the Second Report and Order that could serve a variety of needs.[71] We continue to believe that 10 MHz blocks, both on their own and in combination with the 30 MHz blocks or with each other, are useful to support a variety of PCS services. Throughout this proceeding, several parties have indicated that 10 MHz blocks would be suitable for providing services ranging from specialized or "niche" applications to services comparable to those now provided by cellular systems.[72] In addition, the 10 MHz blocks will be beneficial both for cellular licensees, who have limited eligibility for PCS participation in region, and possibly also for augmenting SMR. Finally, commenters discussed the desire to aggregate the 10 MHz blocks with the larger blocks in order to increase capacity for PCS services in heavy demand areas.[73]

---

[70] See Time Warner Petition at 2.

[71] See Second Report and Order at ¶ 24.

[72] AMT/DSST states that specialized services can meet unserved demand for PCS and that 10 MHz will be sufficient for some applications. See AMT/DSST Comments at 4. See also CTIA Comments at 10; Murray Comments at 3-4; and Nextel Reply at 4; Transcripts of the PCS Public Forum at 43 (April 11, 1994).

[73] See PCS Action Reply at 2; Time Warner Reply at 2-4.

61. For these reasons, we believe the public interest is best served by continuing the allocation of licenses on 10 MHz channel blocks in addition to the 30 MHz licenses. We must limit the number of 10 MHz blocks to three for any given area, however. We are constrained because we also want to reserve spectrum for other uses such as MSS and unlicensed PCS. Allowing the flexibility to aggregate spectrum blocks of different size will help ensure that efficient providers succeed. We believe that 120 MHz will provide sufficient spectrum to promote competition rapidly and that flexibility in the provision of service will provide incentives for efficient use of the spectrum.

62. In sum, we believe that a band plan that provides for three 30 MHz licenses and three 10 MHz licenses, all in the lower band, compared to our earlier plan, will better ensure that PCS services are available promptly and competitively to the American public.

3. Aggregation and Disaggregation

63. A number of petitioners request clarification of, or changes to, our policies regarding the aggregation or subdivision of PCS spectrum and PCS service areas. In the Second Report and Order, we limited any party's ability to aggregate PCs spectrum to an attributable interest in 40 MHz.[74] Companies that were deemed to hold attributable interests in cellular license(s) covering 10 percent or more of the population in a PCS service area were limited to holding a single 10 MHz PCS license in that area.[75] We did not address the issue of whether we would allow disaggregation of spectrum.

64. Comcast requests clarification that the 40 MHz aggregation limit applies only to PCS spectrum.[76] PNSC submits that certain PCS licensees should be permitted to aggregate more spectrum than that allowed under the current plan. It recommends that BTA licensees in areas with populations between 200,000 and 999,999 be permitted to aggregate up to 60 MHz and that cellular carriers serving markets with populations of one million or less be permitted to aggregate up to 20 MHz. PNSC further urges that no limit be set on aggregation of spectrum in areas with populations less than 200,000. PNSC questions the viability of seven PCS licensees and states that rural BTA licensees should be permitted to aggregate more spectrum because they are at a competitive disadvantage vis-a-vis MTA licensees.[77] It contends that if we do not raise the aggregation limit, we should adopt a channeling plan that provides for three 30 MHz MTA licenses, with one set-aside for designated entities, and three 10 MHz BTA licenses, with one set-aside for designated entities.

---

[74] See Second Report and Order at ¶ 61.

[75] Id. at ¶ 106.

[76] See Comcast Petition at 15.

[77] See PNSC Petition at 5-8.

65. PCS Action and Time Warner request that PCS licensees be permitted to aggregate up to 40 MHz of spectrum in the lower band through leasing, joint ventures, consortia, or other means.[78] They contend that this would eliminate the need for licensees to use more expensive equipment capable of operating in both the upper and lower bands. CTIA does not object to the overall 40 MHz limit on PCS ownership. However, it requests that cellular licensees be subject to the 40 MHz limit and that they be allowed to acquire up to 15 MHz of PCS spectrum. Thus, CTIA argues that, in addition to the right to bid on a 10 MHz channel, cellular operators should be permitted to acquire an additional 5 MHz either through bidding and subsequent divestiture or after the auction.[79] BellSouth and Point suggest a uniform 45 MHz aggregation limit that would apply to the total spectrum used by an entity for all the mobile communications services it provides in a given area, including, cellular, SMR, wide-area SMR and PCS.[80] BellSouth argues that the current approach limits cellular providers to an additional 10 MHz of PCS or a total of 35 MHz of spectrum while enhanced SMRs can acquire up to 40 MHz of PCS spectrum or a total of 59 MHz of spectrum.[81]

66. Decision. We believe that the 40 MHz limit for PCS spectrum is appropriate. No new information has been presented to indicate that each licensee in a market would require more than 40 MHz to provide broadband PCS service. Although at least one party argued that this limit should be amended to allow greater aggregation in rural areas, we do not believe that greater aggregation is needed.[82] In particular, the demand in rural areas is expected to be sufficiently low that there should be no need for more than 40 MHz by any one provider. If demand in rural areas is not sufficient to meet than 40 MHz of spectrum to one entity, it would be preferable to have additional competitors serve these customers rather than to license more than 40 MHz of spectrum to one entity.

67. One of our goals in this proceeding is to promote competitive delivery of wireless services. As a result, we feel that not only is an overall cap on PCS spectrum important to prohibit excessive spectrum aggregation, but that a comparable separate limit should be placed on cellular providers since they already hold 25 MHz of clear spectrum and already have a large number of existing wireless customers. To ensure competitive parity, cellular carriers will be subject to an overall spectrum cap of 35 MHz for their combined PCS and cellular spectrum. We are persuaded by the argument, raised by a number of parties, that because of cellular's "headstart" in the wireless telephone market, existing infrastructure and large base of customers, cellular carriers might be able to dominate the wireless market if they receive more

---

[78] See PCS Action Petition at 39; Time Warner Petition at 8.

[79] See CTIA Petition at iii.

[80] See BellSouth Petition at 15-17; Point Petition at 3.

[81] See BellSouth Petition at 15-17.

[82] See PNSC Petition at 8.

than 10 MHz of PCS spectrum.[83] We also recognize that new entrants face a possibly lengthy process to relocate existing microwave users so they can use all of their spectrum. Cellular carriers already have 25 MHz of clear spectrum in operation whereas new entrants may have to relocate microwave users to gain access to that much spectrum, even if they acquire 40 MHz at the auction. In addition, we are concerned that additional spectrum acquired by cellular entities may reduce the amount of spectrum available to new entrants and increase the costs to new entrants. To promote the ability of new entrants to acquire spectrum and rapidly begin service as strong competitors to in-region cellular carriers, we have decided to continue to permit cellular carriers to acquire and hold only a single 10 MHz license in any PCS service area where they are considered in-region. (See Cellular Eligibility section infra). However, because we realize that as competitive PCS offerings are implemented, the market advantages enjoyed by cellular carriers should decrease, we will allow cellular carriers to acquire an additional 5 MHz after January 1, 2000. This will allow cellular carriers to acquire the same total amount of spectrum (40 MHz) as other entities. Limiting in-region cellular carriers to 10 MHz of PCS spectrum for five years will not disadvantage them relative to the new entrants who must contend with microwave relocation over their entire spectrum block(s) and do not necessarily have an established customer base or comparable infrastructure advantages.[84]

68. We reject the contention BellSouth and Point that the aggregation limit be raised to 45 MHz to permit cellular entities to acquire an additional 20 MHz. If we were to allow such aggregation to 45 MHz through the disaggregation of 30 MHz blocks, the number of full service competitors could be reduced to the detriment of realizing the goals we have set forth for PCS. If we were to allow aggregation to 45 MHz through the aggregation of 10 MHz blocks, there would not be enough blocks to assure both full cellular participation and the participation of other parties who desire 10 MHz licenses. We conclude that 40 MHz remains an appropriate limit on PCS spectrum because it protects the competitive structure, provides sufficient spectrum for efficient provision of wireless services, and encourages a wide diversity of firms to participate in the industry. Furthermore, we are seeking comment in another proceeding as to whether and how our aggregation limit may be applied uniformly to all mobile communications providers. We find that extending the PCS spectrum aggregation limit to include other mobile services, such as SMR and wide-area SMR services, is beyond

---

[83] See Letter from PCS Action to the FCC (May 27, 1994). Many other parties, including one company with existing cellular holdings, expressed concern that allowing in-region cellular carriers to acquire additional spectrum would lead to a market dominated by cellular carriers. See Letter from US West to the FCC (June 1, 1994); Letter from MCI to the FCC (May 26, 1994); Letter from Time Warner to the FCC (May 27, 1994).

[84] Because we are prohibiting spectrum disaggregation until the year 2000, cellular entities will have an opportunity to acquire 5 MHz of additional spectrum at that time.

the scope of this proceeding. We therefore intend to address issues relating to spectrum aggregation across other commercial mobile radio services in a separate proceeding.[85]

69. Although, as stated above, we believe spectrum disaggregation should be permitted, we are concerned that initially, there may be anticompetitive incentives to disaggregate spectrum. Two or three entities might purchase a viable 30 MHz license and disaggregate it to reduce the number of new entrants. Thus, we will permit disaggregation of spectrum by any licensee only after it meets the five year construction requirement. The five year point will allow the PCS market to take shape. Entities desiring to use small amounts of spectrum before the prohibition on disaggregation ends can either purchase the 10 MHz blocks of spectrum if they wish to provide service using less than 30 MHz or enter into joint ventures or resale arrangements to facilitate their access to spectrum. We expect to conduct a further proceeding to specify the rules for spectrum disaggregation, which will also explore the possibility of permitting disaggregation for other commercial mobile radio services.

70. We agree with the suggestions of the petitioners and responding parties that PCS entities should eventually be permitted to disaggregate spectrum. We feel that, in the future, disaggregation will complement the three 30 MHz and three 10 MHz channel plan by allowing subdivision of spectrum blocks where service providers find that economic or other conditions warrant it. Allowing spectrum disaggregation, even if it is prohibited until the first construction benchmark, will provide appropriate incentives for service providers to conserve their use of spectrum and to invest in spectrum conserving technologies. Because PCS licensees have paid for the use of the spectrum and have the ability to sell it in the future, they should be especially sensitive to the value of the resource they are using and will be motivated to ensure that it is used in the most valuable way.

71. In determining the appropriate placement of the 10 MHz blocks within the lower band, we seek to promote the development of an efficient market structure and to ensure that no subset of license has any inherent competitive disadvantage due to placement of licenses in the band plan. In particular, we must consider the benefits of aggregating the 30 MHz blocks with the 10 MHz blocks compared to the benefits of aggregating the 10 MHz blocks themselves. Interspersing the 10 MHz blocks between each 30 MHz block facilitates aggregation to 40 MHz by allowing combination of each contiguous 30 MHz and 10 MHz license pair. This also facilitates relocations of the existing fixed microwave operations by matching fixed microwave channels with PCS channels. This will keep to a minimum the number of parties responsible for each relocation which will reduce relocation negotiation, timing and costs. On the other hand, keeping all 10 MHz licenses contiguous would allow more efficient aggregation of these licenses as a substitute strategy for obtaining one of the three 30 MHz block. We conclude that interspersing the 10 MHz licenses between the 30 MHz licenses to permit efficient aggregation up to 40 MHz should the market favor that

---

[85] See Further Notice of Proposed Rule Making, GN Docket No. 93-252, FCC 94-100, released May 20, 1994.

outcome is the best approach. Recognizing that aggregation of the 10 MHz licenses may be attractive to some parties, however, we are also making two of the 10 MHz licenses contiguous so as to permit this aggregation to 20 MHz, should some parties favor 20 MHz over 30 MHz. (See Cellular Eligibility infra.)

4. Service Areas

72. In the Second Report and Order, we specified that the two 30 MHz blocks would be licensed on an MTA basis. We also specified that the 20 MHz block and four 10 MHz blocks would be licensed on a BTA basis.[86] We adopted this plan to promote the rapid deployment and ubiquitous coverage of PCS and felt that these areas would follow the natural flow of commerce.[87]

73. A number of petitioners request changes in the service areas designated for PCS blocks. Pegasus, for example, requests that the Commission adopt a Mayaguez/Aguadilla-Ponce BTA separate from the San Juan BTA. Pegasus argues that Puerto Rico should comprise two BTAs because the two areas are split geographically by mountains.[88] In addition, DWMP points out that some rural BTAs are larger than a small MTA and that it would be unreasonable to ask a rural PCS provider to meet the construction requirements in these sparsely-populated areas. DWMP requests that we specify smaller service areas.[89] Other parties, such as Killen and NTCA, favor use of the MSA/RSA service areas that are used for cellular licenses.[90] Point Communications states that either BTAs or the cellular MSA/RSA service areas should be used for PCS, arguing that all PCS should be licensed on the same service area basis.[91] CTIA and Nextel suggest that all licensing be based on BTA service areas.[92] Nextel believes that MTA service areas will result in poor build-out and lack of service in rural locations.[93] BellSouth submits that the six 20 MHz blocks it suggested

---

[86] See Second Report and Order at ¶ 76.

[87] Id. at ¶ 73.

[88] See Pegasus Petition at 1-2.

[89] See DWMP Petition at 3.

[90] See Killen Petition at 1-3, NCTA Petition at 1-8. There are 306 Metropolitan Statistical Areas (MSAs) and 428 Rural Service Areas (RSAs). See 47 C.F.R. §22.2.

[91] See Point Petition at 2-4.

[92] See CTIA Petition at 9-10, Nextel Petition at 11-13.

[93] See Nextel Petition at 1-2.

should be licensed on a BTA basis.[94] BellSouth argues that MTAs are inappropriate because they would result in a lack of parity among competitors, and uniform initial spectrum blocks and service areas would encourage competition and give effect to market forces.

74. At the PCS Public Forum held on April 11 and 12, 1994, Dr. C. J. Waylon of GTE submitted that MTA coverage offers large geographic service areas that would enhance competition with existing cellular service providers.[95] Mark Roberts of Alex Brown and Co. also voiced support for the larger MTA service areas.[96] However, some parties, such as George Murray, felt that all blocks should be licensed on a BTA basis to provide an opportunity for small entrants to compete on an equal footing with other PCS providers.[97]

75. Decision. We have decided to retain the geographic license areas definitions for PCS licenses, adopted in our Second Report and Order. We reject the arguments that all licenses should have the same geographic scope, as in NTIA's proposal to use the Department of Commerce Economic Areas.[98] We also reject a re-drawing of the boundaries along cellular MSA/RSA lines as proposed by Killen, NTCA, and Point.[99]

76. We reject the use of cellular MSA/RSA boundaries for a number of reasons. The ten year history of the cellular industry provides evidence generally that these service areas have been too small for the efficient provision of regional or nationwide mobile service. The large transaction costs to aggregate MSAs and RSAs that have been incurred over the past ten years in the cellular industry have frequently been directed towards geographic aggregation to provide wider service areas for consumers and to lower costs of providing service. Rather than forcing replication of this costly and time-consuming process, we are beginning with larger service areas, which we expect to minimize the need for costly post-auction transactions. We also hope to spur market competition from new PCS providers by starting with larger initial geographic service areas to alleviate the cellular headstart advantage.[100] We realize that the MTA and BTA license boundaries do not coincide with existing cellular

---

[94] See BellSouth Petition at 17.

[95] See Transcripts of the PCS Public Forum at 82-83 (April 11, 1994).

[96] See Transcripts of the PCS Public Forum at 439 (April 11, 1994).

[97] See Murray Petition at 4-8.

[98] See Letter from NTIA to the FCC at 2 (May 31, 1994).

[99] See Killen Petition at 1-3; NTCA Petition at 1-8; Point Petition at 2-4.

[100] CTIA states that as of year-end 1993, cellular companies served more than 16 million subscribers and had invested nearly $14 billion in building their systems. Letter from CTIA to the FCC (April 29, 1994).

license boundaries, but feel that the costs imposed by these different license boundaries will be outweighed by the benefits of larger initial service areas. We are cognizant of problems created by overlaps between the PCS and cellular service areas, and provide some relief from these problems. (See Cellular Eligibility, infra.)

77. We also are rejecting the suggestion that all licenses should have the same geographic scope whether MTAs (as proposed by PCS Action), BTAs (as proposed by BellSouth, CTIA, and Nextel) or Department of Commerce Economic Areas (proposed by NTIA). While identical geographic areas may impose more initial competitive parity, we do not believe that this will maximize competitiveness and participation in the provision of PCS services. Licensing all blocks on an MTA basis might increase competitiveness with cellular, but it would limit the ability of cellular companies and designated entities to participate in the provision of PCS. Cellular companies could be restricted because of overlaps with MTAs that might not occur with BTAs. Designated entities are likely to be better able to finance the construction of PCS across a BTA than an MTA. Thus, by licensing some blocks on a BTA basis, we comply with Congress' directive that we prescribe area designations that promote economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and business owned by members of minority groups and women.[101]

78. We therefore continue to feel that a combination of MTA and BTA licenses will give licensees the opportunity to select and combine service areas and promote broad participation in the provision of PCS services by firms of various sizes. Licensing two of the 30 MHz blocks on an MTA basis will permit these licensees to operate in large service areas which will facilitate interoperability and roaming across wide geographic areas. Licensing the third 30 MHz block on a BTA basis will not preclude such efficiencies because of the ability to aggregate licenses geographically. In addition, in much the same way as the variety of spectrum block sizes allows various strategies, the variety of geographic sizes will allow firms to determine the optimal geographic strategy they wish to pursue. This will also help us to meet the statutory objectives of disseminating licenses to a wide variety of licensees.[102] In addition, allocating four of the six licenses on a BTA basis addresses the concern that rural buildout would not occur with MTA licenses.

79. Finally, we concur with Pegasus' suggestion with regard to the Puerto Rico service area and will provide two separate BTA service areas in Puerto Rico, one for Mayaguez/Aguadilla-Ponce and the other for San Juan. This action recognizes the difficulties created by the mountain range separating these two areas. No parties opposed this request and we find this adjustment to be in the public interest.[103]

---

[101] See 47 U.S.C. § 309 (j)(4)(C).

[102] See 47 U.S.C. § 309(j)(3)(B). See also Alliance Petition at 2-3; Columbia Petition at 2-3; NTCA Petition at 3; RCA Petition at 2, 7; Intelco Petition at 7.

[103] See Pegasus Petition at 10.

5. Geographic Partitioning

80. In its petition, McCaw asks us to permit applicants to subdivide PCS blocks and service areas.[104] McCaw states that this would allow parties to bid jointly for PCS BTA and MTA licenses, and then subdivide the PCS operating authority on either a geographic or spectrum basis. It states that this approach would diminish the disadvantages created by using MTAs and BTAs rather than the significantly smaller cellular MSA and RSA service areas. This would allow cellular entities to offer PCS services in areas where they do not provide cellular service and yet would not qualify for licensing in the entire PCS service area.

81. Several parties responding to the petitions favor allowing partitioning of PCS service areas. For example, AIDE, CTIA and McCaw state that geographic and spectrum partitioning will promote efficient use of the spectrum and will encourage service in rural areas.[105] AMT submits that partitioning will offer flexibility to PCS providers.[106] GTE states that partitioning will expedite the introduction of new services, promote participation in PCS, and allow PCS to serve niche markets.[107] Finally, CUC recommends that the Commission allow partitioning only within a specified time after licensing to ensure universal deployment of PCS and prevent licensees from warehousing spectrum that they do not intend to utilize.[108]

82. Other responding parties oppose allowing geographic partitioning. For example, GCI and MCI argue that interested parties should form consortia to provide uniform service across areas instead of dividing the allotments.[109] GCI, MCI and Nextel argue that allowing geographic partitioning would inject additional variables into the initial auction process and complicate the development of an orderly post-auction market.[110] MCI contends that to avoid manipulation and evasion of the construction requirements, voluntary partitioning should be limited to geographic sizes no smaller than a BTA with no less than 10 MHz of spectrum, pending examination of the feasibility of smaller partitions in a separate rule making.[111]

---

[104] See McCaw Comments at 2-24.

[105] See AIDE Comments at 5; CTIA Comments at 16; McCaw Comments at 2-24.

[106] See AMT Comments at 2-3.

[107] See GTE Comments at 9-10.

[108] See CUC Comments at 12.

[109] See GCI Comments at 15-16; MCI comments at 3-5.

[110] See GCI Comments at 15-16; MCI comments at 3-5; Nextel Comments at 13-14.

[111] See MCI Comments at 3-5.

83. Decision. We agree with the parties that oppose permitting geographic partitioning at this time. We find that there is a significant risk that partitioning can be used to circumvent construction requirements. While there may be efficiency enhancing geographic partitions, much of the benefit can be obtained through other arrangements that do not raise the same concerns about circumvention of our construction rules.[112] On balance, we conclude that we should not adopt a policy allowing general geographic partitioning, but recognize that the balance may be different for particular groups of service providers, such as rural telephone companies or to create PCS ownership opportunities for companies owned by minorities or women. Therefore, we will consider the issue of geographic partitioning for rural telephone companies and other designated entities in our forthcoming Order, to adopt specific competitive bidding rules for broadband PCS in PP Docket No. 93-253.[113] There we will address other designated entity preferences and will rely on the record in both proceedings in making our final determinations on this matter. Also, we will address whether we should recover the unserved PCS areas at the end of the ten-year construction period, in a later proceeding after we have had an opportunity to assess the scope of system build-outs.

6. Unlicensed Devices

84. In developing a band plan for PCS, we have had to weigh the spectrum requirements of licensed PCS with the amount of spectrum allocated for unlicensed PCS. For reasons described above, the new band plan moves all of licensed PCS to the lower band. As a result of this change, we have had to reduce the amount of spectrum available for the operation of unlicensed PCS devices from 40 to 20 MHz. This is the amount of spectrum we originally proposed for unlicensed devices. Despite having less spectrum available for unlicensed PCS devices in the near term, we believe the new band plan will have an overall positive effect for consumers in terms of the diversity and utility of unlicensed devices available on the market, as well as the rapid deployment of competitive licensed PCS Services.

85. One reason we reach this conclusion is that even without this change it is unlikely that the 20 MHz reallocated to licensed from unlicensed would have been used in the near term for unlicensed. The spectrum at 1890 to 1910 MHz was regarded as less desirable than the 20 MHz retained for unlicensed PCS at 1910-1930 MHz because it contains significantly more microwave incumbents.[114] Our expectation was that unlicensed devices first would operate on the 1910-1930 MHz spectrum because the cost of clearing this spectrum is

---

[112] See GCI Comments at 15-16; MCI Comments at 3-5; Nextel Comments at 13-14.

[113] We recognize that we stated in an earlier order that the issue of geographic partitioning by rural telephone companies would be addressed in this order, but we now believe that this issue should be addressed with other issues regarding designated entities. See Second Report and Order in PP Docket No. 93-253 at ¶ 243.

[114] See Transcripts of the PCS Public Forum at 11-12 (April 12, 1994):

significantly less. Licensed PCS providers, by contrast, provide ample evidence in the record that they are ready to begin the relocation of microwave incumbents in the lower band and provide service in the near term and can use the spectrum from 1890-1910 MHz rapidly. Thus, consumers are more likely to obtain immediate benefits if we allocate this spectrum to licensed PCS rather than for unlicensed PCS devices.

86. Another benefit of the new band plan is that the licensed and unlicensed PCS spectrum will be located in close proximity on the lower band. Consumers will have more choices for equipment that operates on both unlicensed and licensed PCS bands, and will not have to buy higher-priced equipment that operates on both the lower and upper PCS bands to have available the full array of service options with a single piece of equipment. Finally, we intend that the initial 20 MHz allocation for unlicensed PCS devices meet the near term spectrum requirements for unlicensed devices.[115] To consider the long-term spectrum requirements of unlicensed PCS devices, we intend to issue a Notice of Proposed Rule Making in the near future to identify additional spectrum for unlicensed PCS devices.

87. For the reasons set forth above, therefore, we conclude that consumers and manufacturers of equipment intended for use on the unlicensed band will benefit from the new band plan. This does not diminish our concern that there be sufficient spectrum allocated for unlicensed PCS devices to accommodate expected demand, and therefore as noted above, we are committed to instituting a further rule making for this purpose to meet the long term requirements for unlicensed PCS devices, including those potential unlicensed uses that may not be accommodated readily in the initial 20 MHz allocation.

B. Private Use

88. In their petitions, UTC and APCO request that we set aside a portion of the licensed PCS spectrum for private PCS operations such as public safety or internal company use.[116] UTC argues that essential public services and private industries require advanced mobile/portable communications capabilities that cannot be provided by commercial PCS. Further, UTC states that the current rules preclude the development of such private systems. UTC also states that for private users: 1) 10 MHz channels are too large for a single licensee's requirements; 2) the construction requirements are impractical and inappropriate; 3) the service areas do not correspond to the service territories of private entities; and 4) competitive bidding is inappropriate for public safety and private systems.[117] APCO agrees, and argues that public safety agencies need spectrum for new life-saving

---

[115] We agree that both unlicensed asynchronous and isochronous devices may need additional spectrum in the near future. See Transcripts of the PCS Public Forum at 10 (April 12, 1994).

[116] See UTC Petition at 2-4; APCO Petition at 4-6.

[117] See UTC Petition at 2-4.

communications technologies that will not, and cannot, be provided by carrier-based services such as PCS. APCO states that Congress repeatedly has mandated that radio services that are necessary for the safety of life and property deserve special consideration in the allocation of spectrum.[118]

89. Several parties, including APC, MCI, Sprint, PCIA and TDS, oppose allocation of PCS spectrum for the private use of utilities and public-safety organizations.[119] These parties argue that private organizations will have full access to unlicensed PCS and that PCS licensees will have incentives to structure systems for the internal use of private organizations. Sprint states that reducing the amount of spectrum available for commercial PCS licenses would compromise the competitiveness and viability of PCS. Sprint also notes that providing emerging technology spectrum for private use would not provide auction revenue for the government. On the other hand, API and ITA support a separate spectrum allocation for "private PCS" systems, arguing that many private communications operations cannot be transferred to public systems due to service reliability concerns.[120]

90. Decision. We agree with the parties who argue that both commercial PCS service and unlicensed PCS devices will be able to meet many of the communications requirements of private entities. The PCS licensees will be permitted to tailor specific service applications to the particular needs of individual organizational customers. Any such service applications, of course, must be consistent with policies we have established for the regulation of commercial mobile radio services under Title II of the Communications Act.[121] Such applications could include the use of dedicated capacity. Where such arrangements might not be satisfactory, entities desiring spectrum solely for internal private use could, of course, bid for licensed PCS

---

[118] See APCO Petition at 4-6.

[119] See APC Comments at 3; MCI Comments at 6; Sprint Comments at 5-6; PCIA Reply at 2; TDS Comments at 13.

[120] See API Comments at 8-9; ITA Comments at 4-5.

[121] See CMRS Second Report and Order, 9 FCC Rcd at 1439 n.130:

> The terms and conditions for different classes of customers may, of course, vary. Whether such differences are lawful would be a question of whether there is unreasonable discrimination under Section 202(a) of the [Communications] Act. In the case of individualized or customized service offerings made by CMRS providers to individual customers, it is our intent to classify and regulate such offerings as CMRS, regardless of whether such offerings would be treated as common carriage under existing case law, if the service falls within the definition of CMRS.

spectrum individually or as a group intending to share the licensed facilities.[122] Companies that value private use of the spectrum highly could win a license at auction; otherwise they could contract with a licensee to provide the services they need, or procure such services from resellers. Moreover, as many commenters argue, we believe that setting aside spectrum for private interests would not help us achieve the goals set forth for PCS, and at the same time, could detrimentally affect competitive service provision and the efficient allocation of scarce spectrum resources. Also, the extent to which additional spectrum is required for private and public safety use is being considered in a separate proceeding that addresses allocation of spectrum below 5 GHz transferred from Federal government use.[123] Accordingly, we will deny UTC's and APCO's requests that we set aside a portion of the spectrum allocated to PCS exclusively for private PCS operations.

C. Mobile Satellite Services (MSS) Issues

91. AMSC, Comsat, and TRW argue for preservation of the 2180-2200 MHz band for future allocation to MSS.[124] The petitioners oppose allocation of spectrum to PCS that has been allocated internationally to MSS, contending that such allocation is inconsistent with the

---

[122] We also note that, while broadband PCS is presumptively classified as a Commercial Mobile Radio Service (CMRS), parties acquiring licenses may request Private Mobile Radio Service (PMRS) classification if they meet our requirements. See CMRS Second Report and Order at ¶ 39.

[123] See Notice of Inquiry, ET Docket No. 94-32, 9 FCC Rcd 2175 (1994). This proceeding addresses, inter alia, a Petition for Rule Making filed by the Coalition of Private Users of Emerging Multimedia Technologies (COPE) for the development of an "Advanced Private Communications Service," using 75 of the 200 MHz to be transferred to our jurisdiction from Federal government spectrum in compliance with the terms of the Omnibus Budget Reconciliation Act of 1993.

[124] The 1992 World Administrative Radio Conference of the International Telecommunications Union (WARC-92) allocated 80 MHz of spectrum to MSS in the bands 1970-2010 MHz and 2160-2200 MHz while retaining the existing fixed and mobile allocations in those bands. Petitions from MSS interests seek removal of the PCS allocation from the 2180-2200 MHz band to preserve the option of allocating that band domestically to MSS. In 20 MHz (the 1970-1980 MHz and 2160-2170 MHz bands) of this spectrum, MSS is limited to Region II (generally countries in the Western Hemisphere); in the remaining 60 MHz (1980-2010 MHz and 2170-2200 MHz), the MSS allocation is worldwide. In the Second Report and Order, the Commission allocated 20 MHz (2180-2200 MHz) of this spectrum to PCS and retained the existing U.S. allocations in the remaining 60 MHz (the bands 1970-1990 MHz and 2160-2180 MHz were held in reserve for future emerging technologies, and the existing broadcast auxiliary allocation was maintained in the 1990-2010 MHz band). The WARC-92 allocation pairs 2180-2200 MHz for transmission from the satellite (downlink) with 1990-2010 MHz for transmission from subscribers (uplink).

United States' support for these allocations at WARC-92 and impedes the introduction of global MSS. In their comments, AMSC claims that since sharing between MSS and the Broadcast Auxiliary Service in the 1990-2010 MHz band may be possible, the MSS paired frequencies at 2180-2200 MHz should not be allocated to PCS.[125] Comsat and TRW argue that the Notice did not propose to consider allocation to PCS of the 2180-2200 MHz band and that parties were therefore denied the opportunity to comment fully on this issue.[126] TRW argues that we should reallocate the entire 1970-2010 MHz and 2160-2200 MHz bands to MSS to match the international allocations. To preserve at least the worldwide MSS allocations, TRW suggests that the four 10 MHz PCS blocks in the 2130-2150 MHz and 2180-2200 MHz bands be relocated to the 2110-2150 MHz band.[127] Motorola also filed a petition stating that, while it supports allocation of sufficient spectrum for terrestrial PCS, the Commission should initiate a separate proceeding to identify and allocate additional spectrum outside the PCS bands for MSS.[128]

92. Most responding parties oppose the petitioners' requests that additional spectrum be reserved for MSS. MCI, Sprint, UTC, API and Bell Atlantic oppose reallocating any of the PCS spectrum to MSS. API and UTC state that while MSS can offer a wide range of valuable services, an adequate spectrum reserve for the development of MSS has been established and no more should be allocated.[129] MCI states that, to the extent the Commission believes there may be a future need for additional MSS spectrum, the Commission should initiate a separate proceeding to identify and allocate other bands for MSS.[130] UTC argues that the over 100 MHz allocated for MSS is more than sufficient.[131] It contends that the petitioners' real concern appears to be that there should be sufficient spectrum to accommodate all potential MSS applicants rather than that the overall allocation to MSS is insufficient to meet expected demand. Sprint and Bell Atlantic support the allocation of 120

---

[125] See AMSC Petition at 2-3, 6.

[126] See Comsat Petition at 2-3, 15-22; TRW Petition at 1-2.

[127] See TRW Petition at 2-6.

[128] See Motorola Petition at 3.

[129] See API Comments at 8-9; UTC Comments at 6-7.

[130] See MCI Comments at 6.

[131] UTC observes that 63 MHz of spectrum is allocated domestically for MSS at 1544-1559/1645.5-1660.5 MHz and 1610-1626.5/2483.5-2500 MHz and that 40 MHz can be used for MSS at 1970-1990/2160-2180 MHz. See UTC Comments at 6-7.

MHz for broadband PCS and oppose reallocating any of that spectrum to MSS. Sprint states that to do so would compromise the competitiveness and ultimate viability of PCS.[132]

93. In reply comments, TRW, AMSC, Comsat, and LQSS support reallocation of the 2180-2200 MHz band from PCS to MSS. Comsat and LQSS agree with TRW that we could substitute other spectrum for PCS to replace the 1980-2200 MHz band.[133] AMSC opposes expansion of the PCS proceeding to include the possible allocation of the 1990-2010 MHz band to MSS. It argues that the current allocation of this band to broadcast auxiliary operations is necessary, that these frequencies are already congested and that there currently is no evidence that sharing between broadcast auxiliary operations and MSS would be feasible.[134]

94. Decision. We recognize the potential value of MSS as a service provider to rural areas that may not be economically served by PCS. We have thus given the petitions of MSS interests, including the various alternatives they suggest, careful consideration. Having been instrumental in obtaining the international MSS allocations at WARC-92, we would not wish unnecessarily to reduce our flexibility to implement those allocations in the U.S. On the other hand, we must also recognize the large potential value of PCS which is a matter of record in this proceeding.[135] It should be noted that these MSS bands are also allocated internationally to fixed and mobile services. PCS, as we have broadly defined it, fits within the international definition of fixed and mobile services and is thus consistent with international agreements on the use of this spectrum. Because spectrum is a limited resource, we find that to satisfy our goal of allocating sufficient spectrum for a competitive PCS service, we must allocate to PCS a portion of the spectrum internationally designated for MSS. We believe the new plan we are adopting today strikes an appropriate balance between these two services and will provide maximum benefits to U.S. consumers.

95. We disagree with the assertion of Comsat and TRW that we provided insufficient notice and opportunity for comment on the possibility that we might allocate a portion of the internationally designated MSS spectrum to PCS. The PCS Notice sought comment on a wide range of allocation options for licensed PCS ranging from three to five spectrum blocks

---

[132] See Sprint Comments at 5-6; Bell Atlantic Comments at 8-10.

[133] See Comsat Reply at 4-6; LQSS Reply at 1-4; TRW Reply at 2-5.

[134] See AMSTV Reply at 1-5.

[135] PCIA, The Yankee Group, EMCI, and BIS Strategic Decisions all presented demand studies at the PCS Public Forum on April 11, 1994 that showed significant demand for PCS services. In addition, also at the PCS Public Forum, Dr. Jerry Hausman pointed to stock market valuations for SMR companies to support his assertion that there will be significant demand for wireless services in the future.

of from 20 to 40 MHz each.[136] Several of the possible combinations of block size and number of blocks would require the use of spectrum in the bands designated internationally for MSS, and at least one option (i.e., five blocks of 40 MHz each) would require virtually all of that spectrum.[137] We specifically called attention to the fact that some of these options would necessarily require the use of spectrum in other emerging technologies bands, and we did not exclude emerging technologies bands that had been designated internationally for worldwide or Region II MSS.[138] Thus, contrary to petitioners' contentions, we believe that parties were given adequate notice of the possibility that our final PCS allocation could include some or even all of the internationally allocated MSS spectrum in these bands.

96. Under the new band plan, the entire allocation to broadband PCS is located in the 1850-1990 MHz band. The 2180-2200 MHz band, which was allocated to PCS in the Second Report and Order has been returned to reserve status for future allocation potentially to MSS, as requested by the MSS interests. Our new band plan, however, removes an equal amount of spectrum from potential consideration for MSS in the band 1970-1990 MHz band, 10 MHz of which can be used for Region II MSS service. We believe that our new band plan accommodates the future potential of MSS more fully than our original plan and therefore addresses the concerns of a majority of the MSS industry.[139]

97. By shifting the PCS allocation out of the 2180-2200 MHz band we have preserved the option of allocating some or all of that spectrum to MSS in the future. This preserves 50 MHz of the 60 MHz allocated worldwide and thus fits more closely with our international agreements. Twenty MHz of this worldwide MSS spectrum is paired with spectrum inside the current broadcast auxiliary band. In the future, this spectrum could potentially be reallocated for MSS use on a shared basis, if feasible, or exclusively, if suitable replacement spectrum could be found for broadcast auxiliary service. It is our intent to initiate a proceeding to investigate these additional allocation possibilities in the near future, with the purpose of accommodating MSS operations within the remaining internationally designated bands, while at the same time maintaining sufficient spectrum for broadcast auxiliary use. We also intend to pursue additional international allocations for MSS at WRC-95.[140]

---

[136] See Notice of Proposed Rule Making and Tentative Decision, GEN Docket No. 90-314, ET Docket No. 92-100, 7 FCC Rcd 5676, 5692 (1992).

[137] See Second Report and Order at ¶¶ 34, 36.

[138] Id. at ¶ 40.

[139] See Letter from Motorola to the FCC (May 25, 1994); Letter from MSS Spectrum Coalition to the FCC (May 27, 1994).

[140] See Preparation for International Telecommunication Union World Radio Communication Conferences, IC Docket No. 94-31, FCC 94-96, released May 5, 1994.

IV. OWNERSHIP RULES AND CELLULAR ELIGIBILITY

98. In the Second Report and Order, the Commission recognized that permitting cellular licensees to participate in PCS could foster rapid development of PCS by taking advantage of cellular providers' expertise, economies of scope between PCS and cellular service, and existing infrastructures.[141] The Commission also recognized that new entrants would foster competition and expressed concern about potential anticompetitive conduct by parties with cellular and PCS interests in the same geographic area.[142] To balance these competing interests, we permitted cellular licensees to obtain PCS licenses outside of their cellular service areas, but restricted them each to one 10 MHz PCS license within their respective cellular service areas.

99. For the purposes of its PCS rules, the Commission defined an attributable cellular interest as ownership of 20 or more percent of a cellular license.[143] If an entity has attributable cellular interests in a license or licenses individually or jointly covering 10 or more percent of the population in a PCS service area, then that entity would be restricted to one 10 MHz PCS license in that area. If an entity holds interests of less than 20 percent in a cellular license, these interests are not considered attributable and the population covered by that cellular license area is not counted towards the 10 percent population threshold. If an entity holds attributable cellular interests, i.e., interests of 20 percent or more, in licenses that individually or jointly cover less than 10 percent of the population in a PCS service area, that entity may hold licenses for up to 40 MHz of PCS spectrum in that PCS service area. Entities that have attributable interests that put them over the 10 percent population overlap threshold in a PCS service area are deemed "in market" cellular entities and as such may only hold 10 MHz of PCS spectrum in that PCS service area.[144]

100. The 20 percent attribution rule applies on a cumulative basis to all parties with ownership interests in cellular operations. Thus, for example, if four participants in a PCS venture each have an ownership interest of 5 percent in the same cellular licensee serving more than 10 percent of the population of a BTA, the PCS venture in which they all have an interest is deemed to have a 20 percent cellular ownership interest and is restricted to one 10 MHz frequency block in that BTA.[145] However, if the four parties to a PCS application each own 5 percent interests in four different cellular licensees, each of which serves 10 or more percent of the BTA, together they are not restricted to one 10 MHz block because they do not

---

[141] See Second Report and Order at ¶ 106.

[142] Id. at ¶¶ 101, 105.

[143] See Second Report and Order at ¶¶ 107-108.

[144] Id. at ¶¶ 104-110.

[145] Id.at ¶ 107 and n.93.

exceed the 20 percent attribution threshold as to any single cellular license. Therefore, in the latter instance, the parties are permitted to purchase a full 40 MHz PCS spectrum block.

101. Twenty-four parties petitioned for reconsideration of various aspects of the cellular eligibility rules and the general attribution standard used for invoking our PCS ownership limits.[146] The petitioners address: 1) eligibility of cellular licensees; 2) the 20 percent attribution standard; 3) the 10 percent population standard; 4) post-auction compliance by cellular licensees with the ownership restrictions; 5) exemptions from the eligibility restrictions for certain cellular providers; and 6) the interests that should be deemed attributable for purposes of calculating ownership and control of a PCS or cellular license.

A. Eligibility of Cellular Licensees for PCS Licenses

102. Six parties advocate eliminating all eligibility restrictions on cellular providers.[147] Fourteen parties agree with the concept that there should be some restrictions on cellular participation in PCS.[148] These latter parties' positions range from agreeing with the standards of the Second Report and Order to arguing for different measures of both coverage and ownership to favoring different standards entirely, but these parties all accept the idea that there should be limitations on cellular entities holding PCS licenses.[149]

103. We have decided to retain restrictions on cellular participation in PCS. In making this decision, we are aware of the benefits that the cellular industry has to offer PCS, as TDS and McCaw note,[150] including capital, economies of scope, and experience and expertise in the provision of mobile communications services. For this reason, we will continue to allow cellular participation in PCS. In addition, we will make some changes in the specific standards of the Second Report and Order, but we remain convinced that restrictions on in-market cellular providers are necessary to achieve our goal of maximizing

---

[146] Petitioners addressing eligibility and attribution issues include: Alliance, APC, Bell Atlantic, CCIMR, Columbia, Comcast, Concord, CTIA, Florida Cellular, GCI, GTE, INS, MCI, McCaw, NYNEX, OPASTCO, Pacific Telecom, PMN, PNSC, Radiofone, Sprint, Time Warner, TDS, Intelco and US West.

[147] See Bell Atlantic Petition at 4; McCaw Petition at 3; NYNEX Comments at 5-6; Radiofone Petition at 12-15; TDS Petition at 3; USTA Comments at 5.

[148] See AIDE Comments at 18; Cablevision Comments at 6-8; CIS Comments at 1; Concord Petition at 2; CTIA Petition at 14; Florida Cellular Petition at 5; GCI Petition at 5-8; GTE Petition at 2-5; MCI Petition at 1; PCS Action Comments at 13-15; PNSC Petition at 9-10; Sprint Petition at 9-10; Time Warner Reply at 6-8; U.S. West Petition at 16, 26.

[149] Id.

[150] See TDS Petition at 3; McCaw Petition at 3.

the number of new viable and vigorous competitors. In reaching this conclusion we do not assume that in-market cellular providers will engage in illegal anticompetitive behavior. We agree with the assertion of Dan Kelley of Hatfield Associates that our goal in crafting these rules should not be to prevent anticompetitive behavior which may or may not materialize, but rather, to promote competition.[151] Bell Atlantic's assertion that we should not restrict cellular participants because we have no basis for assuming that cellular providers will behave anticompetitively in the PCS market, does not address our goal of promoting vigorous new competition.[152] Similarly, McCaw's arguments that existing cellular providers have minimal market penetration do not respond to our desire to provide consumers with as many competitive choices as possible.[153] We conclude that the public interest would be best served by maximizing the number of viable new entrants in a given market.

104. Finally, while some petitioners, such as Radiofone, point out that SMR and MSS providers are not subject to the same eligibility restrictions as cellular providers,[154] only U.S. West affirmatively requests that the eligibility restrictions of the Second Report and Order be extended to wide-area SMR services.[155] US West claims that wide-area SMR is competitive with PCS and cellular services and asserts that the competitive concerns that apply to cellular systems also apply to wide-area SMR operations. AIDE and Time Warner agree with U.S. West that cellular eligibility limitations should also apply to wide-area SMR providers, because wide-area SMRs are expected to compete with cellular and PCS.[156] Nextel, however, opposes the application of cellular eligibility restrictions to wide-area SMR systems.[157] It states that extending the eligibility restrictions to wide-area SMR systems is beyond the scope of this proceeding and that wide-area SMR operation is too new and too small to have the capability of behaving anticompetitively. We agree with Nextel that imposing eligibility restrictions is beyond the scope of this proceeding. We are, therefore, addressing in another proceeding[158] the eligibility of wide-area SMRs and other commercial radio services to participate in PCS.

---

[151] See Transcripts of the PCS Public Forum at 389, (April 11, 1994).

[152] See Bell Atlantic Petition at 4; see also Second Report and Order at ¶¶ 5, 108.

[153] See McCaw Petition at 3.

[154] See Radiofone Petition at 12-15.

[155] See U.S. West Petition at 16.

[156] See AIDE Comments at 18; Time Warner Reply at 6-8.

[157] See Nextel Reply at 8-9.

[158] See Further Notice of Proposed Rule Making, GN Docket No. 93-252, FCC 94-100, released May 20, 1994.

B. Attribution Rules

105. In the Notice of Proposed Rule Making in this proceeding, we noted our expectation that PCS and cellular licensees serving the same area will compete on price and quality of service. We therefore stated that competitive benefits might be reduced if cellular licensees are permitted to acquire PCS licenses within their service areas and proposed an outright prohibition on cross-ownership of PCS licenses by entities with cellular interests, except that ownership interests of less than one percent (or less than five percent for publicly traded companies) would not be considered.[159] In the Second Report and Order, we found this approach too restrictive. Although we still sought to avoid the potential for undue market power by entities with significant existing market share, we balanced that goal against recognition of the expertise that cellular licensees would bring to PCS markets.[160] We also noted that many entities possess non-controlling interests in cellular licensees exceeding 5 percent but, due to the non-controlling nature of their equity interests, create little potential for anti-competitive behavior.[161]

106. We therefore adopted a simple, bright-line 20 percent cross-ownership attribution standard, pursuant to which entities with 20 percent or greater ownership of a cellular operator were limited to one 10 MHz BTA license for broadband PCS in the same region as their attributable cellular interests.[162] We did not distinguish between different types of ownership such as voting and non-voting stock and general and limited partnership interests. We noted, however, that while a clear 20 percent ownership threshold may be more administratively efficient, a concern remained that some parties with cellular ownership interests will use our rules as an opportunity to control local cellular licensees while retaining less than 20 percent ownership. Since such occurrences would undermine our intent to limit cellular ownership in PCS, we said that we would review carefully this decision, and we explicitly put parties on notice that we would reconsider this limit if our intent to ensure competition between cellular and PCS would be undermined under the ownership rules adopted in the Second Report and Order.[163]

107. With respect to ownership interests in multiple PCS licensees in a single market, we adopted a 5 percent attribution threshold for purposes of the 40 MHz PCS spectrum limit and for purposes of determining cellular ownership in a PCS licensee. We stated that PCS

---

[159] See Notice of Proposed Rule Making, GEN Docket No. 90-314, 7 FCC Rcd. 5676, 5703 n.46 (citing 47 C.F.R. § 22.921(b)).

[160] See Second Report and Order at ¶ 108.

[161] Id. at ¶ 107.

[162] Id. at ¶¶ 107, 108; Section 24.204 of the Commission's Rules.

[163] Id. at ¶¶ 109-110.

ownership interests of 5 percent or more will be attributed to the holder of the interest.[164] In adopting this standard, we cited similar market-based concerns, noting our desire to "ensure that [no entity] is able to exert undue market power through partial ownership in multiple PCS licensees in a single service area."[165] The 5 percent threshold is consistent with the ownership thresholds we apply to cellular and broadcast licensees.[166] We did not find any potential advantages possessed by any existing PCS licensees inasmuch as there are no such licensees. Similarly, we did not discuss the need to accommodate settlements among PCS licensees resulting in non-controlling interests of between 5 and 20 percent because there are no such settlements in the PCS context. We therefore adopted this 5 percent limit for application to PCS multiple ownership, whereas it appeared too restrictive in the cellular-PCS cross-ownership context given the realities of existing historical cellular settlements.[167]

108. Twelve parties petitioned for reconsideration of the cellular ownership attribution standard.[168] The petitioners recommend the following alternatives: 1) raising the 20 percent level of permissible ownership in cellular licensees; 2) attribution based on control rather than ownership; 3) applying an affiliation standard like that in our telco-cable cross-ownership rules; 4) applying an attribution standard based on the rules used to enforce our alien ownership restrictions under Section 310 of the Communications Act; and 5) applying the same attribution rules to PCS as those we apply to broadcast interests.

109. Decision. We continue to believe that the PCS and cellular ownership attribution decisions we adopted in the Second Report and Order, with certain modifications, are appropriate and strike a reasonable balance between promoting vigorous competition and the advantages of allowing experienced mobile communications operators such as cellular licensees to participate as PCS licensees. We disagree with those parties, such as Bell Atlantic and GCI, that suggest the same 20 percent attribution limits should apply to cellular/PCS cross-ownership and to PCS multiple ownership.[169] Generally, we would prefer to use the 5 percent standard for all cross-ownership situations, to maximize competition. We are adopting an attribution threshold of 5 percent for multiple PCS ownership purposes to prevent any party from exerting market power through substantial partial ownership in

---

[164] Id. at n.62, n.92.

[165] Id. at ¶ 61.

[166] See 47 C.F.R. §§ 22.902(b)(5), 73.3555, note (2).

[167] See Second Report and Order at ¶ 107.

[168] Petitioners include: Alliance, Bell Atlantic, Columbia, NYNEX, Pacific Telecom, PMN, CCIMR, Comcast, CTIA, GCI, PCS Action and Time Warner.

[169] See Bell Atlantic Petition at 4; GCI Comments at 9-11.

multiple PCS licensees in the same service area.[170] We see no countervailing reason to risk reducing competition by raising this 5 percent limit for PCS multiple ownership limits. Moreover, the 5 percent threshold is consistent with ownership thresholds we apply to cellular and broadcasting.

110. Such a strict rule for PCS/cellular cross-ownership, however, would not recognize the history of cellular licensing. The 20 percent ownership attribution standard for cellular operators was adopted, in part, because settlements during the initial phase of cellular licensing resulted in partial and often non-controlling interests in those licensees.[171] In light of this history, we believe it would be unfair and unduly restrictive to place the same 5 percent limit on cellular/PCS cross-ownership. For this reason, we decided to allow a 20 percent cellular ownership interest. Further, we believe that given the nature of these settlement agreements, permitting this level of ownership will not decrease the incentives for competition. Therefore we will not require divestiture to a lower level of ownership. The 20 percent standard permits many entities with partial, non-controlling cellular interests to participate in PCS. In adopting the 20 percent standard, we recognized that participation by cellular operators in PCS would offer benefits that include promoting early development of PCS by taking advantage of cellular providers' expertise and permitting attainment of economies of scope between PCS and cellular service and existing infrastructure.[172] We therefore are making an exception to our usual treatment of cross-ownership for purposes of cellular-PCS cross-ownership.

111. We disagree with those entities such as CTIA that argue for a higher cellular ownership attribution threshold such as 35 percent.[173] PCS Action states that if our PCS attribution standard were raised to CTIA's proposed 35 percent, a consortium of NYNEX, Bell Atlantic and Bell South, each holding 33 percent of the consortium, could hold all the 30 MHz MTA licenses in the areas covered by the three parties' CGSAs. According to PCS Action, this would amount to cellular control of PCS services in the entire East Coast and South. PCS Action concludes by advocating retention of the current standard.[174] We believe that 20 percent is the proper standard. A higher attribution threshold (i.e., above 20 percent) for all incumbent cellular entities would tend to suppress competition, because the licensee would have economic incentives not to compete vigorously against competitors in which it holds a substantial equity interest. We conclude that these standards, with exceptions

---

[170] See Second Report and Order at ¶ 29.

[171] Id. at ¶ 107.

[172] Id. at ¶ 104.

[173] See CTIA Petition at iv.

[174] See PCS Action Comments at 16-17.

discussed below related to certain designated entities, remain appropriate, and accordingly we affirm them.

112. A number of parties, including Alliance, Bell Atlantic, Columbia, NYNEX, Pacific Telecom and PMN, request that we amend the attribution standard to base it on case-by-case determinations of control rather than the 20 percent attribution standard.[175] Alliance and others contend that 20 percent is too restrictive and unnecessarily limits participation in PCS by entities that have only passive interests in cellular systems.[176] Bell Atlantic and NYNEX also advocate examining only legal control.[177] Bell Atlantic argues that this standard should apply to both cellular/PCS and PCS/PCS ownership. NYNEX argues that a standard based upon control would ensure that cellular carriers and local exchange carriers are able to provide needed capital and expertise to PCS. CCIMR advocates applying broadcast ownership attribution standards, arguing that these rules distinguish between ownership and control and are as easy to administer as the 20 percent attribution standard.[178]

113. Our goals here include ensuring that the holder of the PCS license has strong incentives to compete against the cellular licensees in the same geographic market.[179] A PCS licensee that has a large equity stake (i.e., more than 20 percent) in a cellular license in the same area has less incentive to compete vigorously against its own equity interest in a cellular provider, even though it may not exercise legal control over the cellular licensee. We believe that our attribution rules provide the right balance between maximizing competition and allowing cellular entities to bring their expertise to PCS.[180] We therefore will not adopt a rule that would require us to find that a party had a "controlling interest" in a cellular licensee before it would be prohibited from investing in a PCS licensee in the same area. Such a rule could substantially delay the licensing of PCS and would not serve our goal of promoting vigorous competition between PCS and cellular licensees in the same area. We believe the bright-line rules we are adopting will result in a faster, less burdensome licensing process.

---

[175] See Alliance Petition at 7-8; Bell Atlantic Petition at 4-5; Columbia Petition at 6-7; NYNEX Petition at 4-5, 13-15; Pacific Telecom Petition at 5.

[176] See Alliance Petition at 7; Columbia Petition at 6-7; CTIA Petition at 20; NYNEX Petition at 13-15; Pacific Telecom Petition at 5.

[177] See Bell Atlantic Petition at 5; NYNEX Petition at 4-5, 13-15.

[178] See CCIMR Petition at 11.

[179] See Policy Statement and Order, GEN Docket 90-314, 6 FCC Rcd 6601 (1991), Notice of Proposed Rule Making and Tentative Decision, GEN Docket 90-314, 7 FCC Rcd 5676, 5690, 5704 (1992).

[180] See Second Report and Order at ¶ 108.

114. We also reject the suggestion by Time Warner that we prohibit all "affiliations" between cellular and PCS licensees in the same market, along the lines of our telco-cable cross-ownership rules.[181] These rules, which are even more restrictive than our broadcast attribution rules, would not provide the flexibility to recognize the history of settlement agreements in cellular licensing and would not allow us to draw on the experience and expertise provided by cellular providers who have low equity stakes. They also might have the effect of restricting contracts between PCS licensees and companies financing their equipment and the build-out of their PCS systems, which could seriously impair rapid investment in and deployment of PCS systems.

115. Comcast recommends that we adopt the attributable ownership standard used to apply the alien ownership restrictions of Section 310(b) of the Communications Act, along with policies found in the broadcast rules.[182] Comcast notes that these alien ownership provisions recognize both voting and non-voting stock in determining percentage of ownership. Comcast also suggests that we adopt the "multiplier" policies of our broadcast ownership rules.[183] Comcast claims that the use of these standards together, because they are clear and well-defined, would help a potential PCS investor decide whether to invest in PCS.

116. We disagree that the alien ownership rules provide a clearer guide than our present attribution standards. Because the alien ownership restrictions set forth in section 310(b) of the Communications Act were created specifically to avoid an undue concentration of foreign influence in the direction of entities involved in communications, the attribution thresholds defined in that section are more complicated than the 5 percent/20 percent bright-line thresholds which we have adopted here. Further, unlike our rules in the broadcast context, we will not allow use of a "multiplier" in the case of multi-tiered entities; the interest of the subsidiary is attributed in full to the parent. We agree, however, that both voting and non-voting stock should be included in determining percentage of ownership of PCS and cellular entities.

117. In determining attributable interests for the purposes of both the 20 percent cellular/PCS cross-ownership rule and the 5 percent PCS/PCS multiple ownership rule, we agree with some of the parties that some clarifications and modifications to our attribution rules are warranted. Our attribution rules must be simple for applicants to understand because they are essential to enforcement of our PCS spectrum cap and our PCS/cellular cross-ownership rules. In the Second Report and Order, we stated that we would consider all equity ownership, including voting and non-voting stock and limited partnership interests, in calculating the percentages of attributable ownership interest in a PCS or cellular licensee. We explained that we would count these interests even if they did not confer on the holder

---

[181] See 47 C.F.R. § 63.54.

[182] See Comcast Petition at 3, 12-15.

[183] See 47 C.F.R. § 73.3555, note (2). See also Comcast Petition at 3, 12-15.

meaningful participation, because the public interest would best be served by a "bright-line" test. We continue to believe that our ownership rules should be clear and easy to administer, and, to that end, we will provide further clarification about which of our ownership rules from the broadcast regime will be applied to PCS. We decline to adopt the full panoply of attribution rules that we apply in the broadcast and in the telco/cable contexts because we believe that the restrictions we are adopting will be sufficient to prevent undue influence and preserve competition.

118. We clarify that, for purposes of these ownership rules, controlling interests per se are attributable. As in other contexts, "control" means not only majority equity ownership, but includes any general partnership interest, or any means of actual working control over the operation of the licensee, in whatever manner exercised. We will rely on existing case law for making control determinations where such issues arise.[184]

119. We also clarify that PCS equity investments of 5 percent or more, and cellular equity investments of 20 percent or more, also are attributable.[185] These equity interests are attributable because they support our goals of developing a competitive PCS service and reducing the incentive for any entity to retard the capability of the new PCS licensee to compete with the cellular or any other PCS licensee in which the entity has an attributable interest. Specifically, the following equity investments will be counted: voting stock, non-voting stock, and limited partnership interests.[186] The percentage of ownership interest in a limited partnership will be based on the partner's economic interest in the partnership. Therefore, the Commission will assess the percentage of the partner's capital contribution as well as the percentage of profits and losses allocated to the partner. As noted above, general partnership interests are deemed attributable regardless of equity percentage because of the control conferred on general partners by the nature of their interest. The following investments are not attributable for multiple or cross-ownership purposes: debt interests, including loans secured by the equipment used in the licensed system, and equity interests below the 20 percent and 5 percent thresholds. These interests are of less consequence to or independent of the entity's performance and therefore provide little incentive to delay or dilute the participation of the new PCS license in the market. In addition, consistent with other multiple- and cross-ownership attribution standard, convertible debt instruments or

---

[184] See e.g., Intermountain Microwave, 24 RR 983 (1963); Cellular Control Notice, 1 FCC Rcd 3 (1986); News International, PLC, 97 FCC 2d 349 (1984); Loraine Journal v. FCC, 351 F.2d 824, 828 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966).

[185] Attribution for cellular purposes also means overlap of the CGSA with at least 10 percent of the population of the PCS market (BTA or MTA).

[186] Thus, in a stock company, PCS and cellular interests of 5 or 20 percent, respectively, of the total outstanding stock as well as interests of 5 or 20 percent, respectively, of the outstanding voting stock will be attributable.

options with rights of conversion to equity interests shall not be attributed unless and until conversion is effected.

120. We also clarify that the interests of a cellular or PCS licensee, or entity in control of a licensee, are attributed to the officers and directors of that entity. We remain concerned about the ability of such individuals to exert influence over companies in which they have significant managerial responsibility. Therefore, if an officer of a company wishes to invest in a PCS market, he or she may only do so if this company itself could make the same investment in compliance with our rules.

121. We also will not allow an exemption for minority investors in companies controlled by a single majority shareholder. Although these rules are used in the broadcast area to exempt from attribution entities not believed to be able to exercise control over a licensee, in the context of PCS we believe that not allowing use of a "multiplier" serves our goal of maximizing competition. These rules will help ensure against undue influence, short of control, by minority stockholders and distant stockholders in parent or intermediate corporations.

122. Through an ongoing proceeding concerning multiple ownership of commercial mobile radio service (CMRS) licensees, we will address whether we should change our rules to restrict or attribute resale, management agreements or other ownership arrangements that could confer possible anticompetitive incentives on parties with multiple CMRS interests.[187] This proceeding will examine whether and to what extent such arrangements could be used to exert control over more spectrum than is permitted under our PCS spectrum cap (40 MHz) or the proposed CMRS spectrum cap.[188]

C. Attribution Rules for Certain Designated Entities

123. Several petitioners request that we exempt from the cellular eligibility restrictions certain classes of cellular owners, such as rural telephone companies or other designated entities. INS, TDS, Intelco and OPASTCO all request us to exempt rural telephone companies from the cellular eligibility restrictions. INS, for example, argues that most rural telephone companies are merely passive investors in cellular licensees, incapable of exercising market power. It argues that PCS could be introduced in rural areas more rapidly through consortia of rural telephone companies.[189] OPASTCO argues that Congress directed the Commission to ensure that opportunities exist for rural telephone companies, among others, to participate in spectrum-based services and that the current cellular eligibility rules exclude

---

[187] We will issue a notice requesting comment on these issues as part of our current proceeding regarding CMRS, in GN Docket No. 93-252.

[188] Id.

[189] See INS Petition at 12. See also TDS Petition at 3-6.

meaningful participation in PCS for many rural telephone companies.[190] Similarly, Intelco contends that rural telephone companies should not be prohibited from bringing PCS to less populated areas simply because they previously invested in cellular licenses serving such areas.[191] USTA argues that all cellular eligibility limits should be eliminated on the grounds that such limits will restrict the full participation of small and mid-sized cellular providers, who are more likely to bring full PCS service to under-served areas.[192]

124. Most commenting parties generally favor exemptions for rural telephone companies and consortia led by designated entities. For example, CUC argues that rural telephone companies are most likely to deploy PCS in rural and remote areas and therefore should be encouraged to do so.[193] RCA contends that the cellular interests of rural telephone companies cannot exercise market power.[194] NRTA states that the Congress intended to ensure that new technologies are available to the residents of less populated areas, and that applying the cellular eligibility restrictions to rural telephone companies that hold significant but non-controlling interests in cellular licenses is incompatible with the intent of Congress.[195]

125. Decision. We agree with INS, OPASTCO, TDS and Intelco that relaxing the cellular eligibility restrictions is appropriate for designated entities.[196] We recognize that many designated entities are merely passive investors in cellular operators and, because of their size, are unlikely to influence pricing decisions. In addition, we seek to address Congress' goal of encouraging the participation of designated entities in the auction process and in the provision of spectrum-based services. We believe that designated entities which have some interests in cellular operations may be especially effective PCS competitors because of their cellular experience. This will help ensure that service is brought quickly to underserved areas and that designated entities become viable competitors. In particular, we believe that rural telephone companies and some small cellular companies, due to their existing infrastructure, are uniquely positioned rapidly to introduce PCS services into their service areas or adjacent areas. However, we are not exempting designated entities entirely

---

[190] See OPASTCO Petition at 1-8.

[191] See Intelco Petition at 4-8.

[192] See USTA Comments at 5.

[193] See CUC Comments at 3.

[194] See RCA Reply at 1-2.

[195] See NRTA Reply at 1-5.

[196] The Commission will provide further guidance as to what constitutes a small business, rural telephone company and a business owned by a member of a minority group or a woman for purposes of 47 U.S.C. § 309(j)in a forthcoming order in PP Docket No. 93-253.

from the cellular eligibility rules, because such an exemption could foreclose from competition from a new PCS entrant. To the extent that designated entities are involved in the control of cellular services, we remain concerned that there is potential for some of these parties to compete less vigorously in the nascent PCS industry. In balancing these interests, we conclude that increasing the cellular attribution threshold for designated entities from 20 percent to 40 percent, if non-controlling, would be appropriate and would further the Congressional mandate noted above. Accordingly, we will permit a designated entity to hold a non-controlling equity interest of up to 40 percent in a cellular licensee without being subject to the cellular PCS eligibility restrictions.

126. AIDE and Comcast support exempting from the PCS eligibility restrictions those cellular entities with minority interests in consortia controlled by designated entities. AIDE states that such an exemption would serve the Congressional intent that designated entities have opportunities to participate in PCS.[197] Murray supports the recommendation of the FCC's Small Business Advisory Committee that only parties that form alliances with designated entities be exempt from eligibility restrictions.[198] Cablevision, on the other hand, opposes an exemption for cellular parties that participate with designated entities in PCS. Cablevision argues that the potential for the cellular provider to exercise undue influence over the PCS licensee is too great to be ignored given the superior knowledge and experience of the cellular provider.[199]

127. We have decided to increase the cellular attribution threshold from 20 percent to 40 percent for any entity proposing to invest in businesses controlled by members of minority groups and/or women. An entity may hold up to a 40 percent interest in cellular licensees before its cellular interests will be deemed attributable, but must limit its participation in a PCS licensee controlled by women or minority group members to a non-controlling interest. We believe that this action will encourage entities with attributable cellular interests to make non-controlling investments in businesses owned by minorities and/or women, furthering Congress' objective of ensuring the participation of these entities in the competitive bidding process by encouraging an alternative source of financing. The record indicates that the main challenge that minorities and women face when seeking to participate in telecommunications licensing is ready access to capital.[200] Investments by cellular providers in these designated

---

[197] See AIDE Comments at 7-9; see also Comcast Petition at 18-19.

[198] See Murray Comments at 7-8.

[199] See Cablevision Comments at 5.

[200] See, e.g., Report of the FCC Small Business Advisory Committee to the Federal Communications Commission Regarding GEN Docket 90-314, 8 FCC Rcd 7826-28 (1993); Second Report and Order, PP Docket No. 93-253, FCC 94-61, released April 20, 1994.

entities should increase the entities chances for success in the auctions and later in service competition by providing access to capital and valuable industry experience.

128. We are not, as requested by Comcast and AIDE, granting a blanket exemption to in-region cellular parties with 40 percent or greater equity or control to participate in consortia that include designated entities. Such an exemption would allow a cellular entity to control a cellular license and create the potential for the entity to influence the PCS licensee to compete less vigorously. As Cablevision observes, the potential for a cellular entity to exercise undue influence over the PCS licensee, especially absent limits on the control exercised by the cellular carrier over the designated entity and its own cellular license, is too great, given the superior knowledge and experience of cellular providers.[201] Therefore, we have relaxed the cellular attribution standard to permit entities that hold up to 40 percent non-controlling equity in cellular licensees in the same service area to make non-controlling investments in PCS licensees controlled by woman- or minority-owned businesses. Because their investment will be non-controlling in both the PCS and cellular license, the threat to competition is diminished. We believe that this relaxed standard encourages availability of capital to PCS businesses owned by women and minorities, yet guards against the dominance of these designated entities by entities which also control a cellular license in the same service area.

129. Comcast requests that the Commission exempt non-wireline cellular carriers from the cellular eligibility rules. Comcast asserts that we have focused too narrowly on wireless competition in devising the cellular eligibility rules. Comcast argues that PCS is a competitor to the wireline "local loop" service of local exchange carriers (LECs) and that one 10 MHz block is not adequate to provide service that is competitive to the wireline local loop. Comcast argues that non-wireline cellular providers have not posed competitive problems, and therefore should be allowed full participation in PCS.

130. Bell Atlantic opposes Comcast's request that we exempt non-wireline cellular providers from the PCS eligibility restrictions. Bell Atlantic argues that Comcast is merely trying to improve its competitive position by this request.[202] PMN agrees that non-wireline cellular carriers should not be entitled to special treatment.[203]

131. We deny Comcast's request that we exempt non-wireline cellular carriers from the PCS attribution rules. Comcast's arguments, which we considered in the Second Report and Order, could impair successful achievement of our goal of creating the maximum number of new competitors.

---

[201] See Cablevision Comments at 5.

[202] See Bell Atlantic Comments at 4.

[203] See PMN Comments at 7.

132. We believe that these important modifications will increase the efficacy of our cellular eligibility rules by guarding against the improper exercise of market power by cellular providers through controlling interests in PCS systems overlapping their cellular coverage areas. We believe that these changes will better address our concerns regarding reduced competition without unnecessarily restricting the ability of cellular providers to participate in PCS, and will provide further incentives for investment in and participation by designated entities in PCS.

D. Population Standard

133. When we adopted regulations restricting the eligibility of certain cellular licensees to hold PCS licenses within their cellular service areas, we noted assertions that cellular operators might have unfair competitive advantages over PCS licensees.[204] On the other hand, we also noted the valuable contributions that the expertise of cellular providers could provide to the PCS industry. Finally, we noted that, because of different geographic licensing boundaries for cellular and PCS, there was a potential for excluding cellular providers from PCS markets even though the degree of overlap was minimal. We decided that such an exclusion was neither fair nor desirable for maximizing competition. In resolving these conflicting interests, the Commission adopted the 20 percent ownership attribution rule to define cellular ownership for purposes of the PCS rules. For entities at or exceeding 20 percent ownership, we applied a 10 percent population coverage overlap test to determine whether the cellular licensee would be restricted to a single 10 MHz PCS license.[205]

134. Florida Cellular, PNSC and CTIA request higher population coverage overlap thresholds. Florida Cellular states that the coverage threshold should be raised to 20 percent so that cellular carriers can compete with PCS carriers in providing mobile services.[206] PNSC requests a 20 to 30 percent threshold, claiming that a 10 percent threshold is unduly harsh and unjustified.[207] CTIA argues for a 40 percent overlap threshold and provides a market analysis based on the merger guidelines of the Department of Justice and the Federal Trade Commission to support its claim that this degree of coverage overlap will not result in anticompetitive conduct.[208] Radiofone also objects to the 10 percent population threshold.[209]

---

[204] See Second Report and Order at ¶¶ 101, 105, 108.

[205] Id. at ¶¶ 104, 108.

[206] See Florida Cellular Petition at 5.

[207] See PNSC Petition at 9-10.

[208] See CTIA Petition at 20.

[209] See Radiofone Petition at 12-15.

135. Cablevision responds that the petitioners requesting a revision of the cellular eligibility rules raise no new facts or arguments and that their petitions therefore should be denied. Cablevision states that the Commission's finding that broadband PCS and cellular will compete justifies maintaining the cellular eligibility rules adopted in the Second Report and Order.[210] AIDE agrees, arguing that cellular providers are unlikely to be aggressive in introducing PCS services in their service area.[211] Similarly, CIS argues that any relaxation of the current rules would allow Regional Bell Operating Companies (RBOCs) and large LECs with cellular holdings to dominate the PCS market to the exclusion of smaller operators.[212] PCS Action also opposes the requests for changes to the current cellular eligibility threshold, arguing that the current standards appropriately limit cellular participation in PCS.[213] Finally, Time Warner finds that our cellular eligibility rules strike an appropriate balance between preventing anti-competitive behavior and allowing cellular providers to participate in PCS.[214]

136. Decision. We have decided to retain the 10 percent population overlap threshold adopted in the Second Report and Order. Our goal is to provide for entry into the PCS market for the maximum number of viable competitors. We remain concerned about the potential for cellular operators to exercise market power and to reduce the number of viable competitors in the PCS market. We believe that the 10 percent population overlap figure is justified and should foster robust competition and prevent competitive abuse. Balancing the potential benefits of the participation in PCS of cellular providers and the potential harms of reduced competition, we are convinced that the 10 percent coverage threshold is appropriate. With this limit we have ensured the opportunity for the emergence of the maximum number of competitors that the market will support for 90 percent of the population. Increasing this limit beyond 10 percent would create greater risk that consumers would be denied the benefit of vigorously competing service providers. We also believe that this threshold is an important means of encouraging new entrants in each area, thereby enhancing competition. On balance, we conclude that the 10 percent population coverage threshold promotes competition among licensees serving a significant percentage of the population, while providing some recognition of the overlaps that will result from the different licensing areas for PCS and cellular. In addition, as discussed below, we will allow divestiture for those entities with CGSA/PCS service area population overlaps between 10 and 20 percent. In reaffirming our 10 percent threshold, we reject proposals to adopt a national population measure or to use a multiplier formula.

---

[210] See Cablevision Comments at 6-7.

[211] See AIDE Comments at 18-20.

[212] See CIS Comments at 4-5.

[213] See PCS Action Comments at 13-15.

[214] See Time Warner Reply at 6.

137. Concord, GCI and MCI argue that coverage of the national population is a better measure of market dominance than coverage of population within a PCS service area. Concord states that the 10 percent overlap standard will preclude many small and mid-size local exchange carriers with partial interests in cellular carriers from participating in PCS. It recommends an eligibility threshold of 1 percent coverage of the national population to ensure that large cellular providers are not able to dominate the market. Concord argues that this standard would allow small and mid-size LECs to participate in PCS.[215] GCI and MCI advocate barring the largest cellular providers from bidding on at least one of the 30 MHz blocks of PCS spectrum. MCI claims that consumer welfare will be served best by barring any cellular provider with more than 10 percent coverage of the nation's population from at least one of the 30 MHz blocks.[216] GCI agrees, claiming that the bidding power of the largest cellular providers will allow cellular providers either to capture the nationwide PCS market or at least to prevent any other licensee from doing so.[217] NYNEX specifically opposes the petitions by MCI and GCI, and asserts that all limitations on cellular participation should be eliminated.[218] PacBell argues against the national population standard proposed by GTE and Sprint, and asserts that the 10 percent rule is clear on its face.[219]

138. We do not believe that a national population test would achieve our goal of providing the maximum number of new competitors in each market. PCS is being licensed on a local and regional, not national basis. A cellular entity who operates in one city but has no presence in another city would be a new competitor in the latter city. We seek to encourage that entity's PCS participation in the second city, because of the likelihood that the experience and economics it brings from its cellular business will stimulate PCS development in the market and promote vigorous competition to other PCS licensees.

139. Two petitioners, GTE and Sprint, recommend a formula for determining eligibility. They suggest multiplying the percentage overlap of the population in the PCS and cellular service areas by the percentage ownership in the cellular provider, to arrive at an "effective POP" figure. Under this formula, an entity owning 25 percent of a cellular provider that covered 20 percent of the population of the PCS service area would have a 5 percent effective POP figure. GTE suggests that a effective population overlap of 20 percent would be an appropriate eligibility threshold,[220] and Sprint advocates a 20 to 30 percent

---

[215] See Concord Petition at 2.

[216] See MCI Petition at 1-5.

[217] See GCI Petition at 5-8.

[218] See NYNEX Comments at 5-6.

[219] See PacBell Comments at 9-10.

[220] See GTE Petition at 2-5.

figure.[221] These petitioners argue that this approach would allow companies to bid for MTA licenses in service areas where they hold only insulated, minority interests in cellular providers in the service area. They also contend that this approach would enhance the opportunities of independent rural and suburban telephone companies to participate in PCS.

140. We do not believe that this "effective POP" attribution rule would achieve our goal of maximizing the number of new competitors. Under this rule, an entity could have a majority equity interest in cellular licenses covering 40 percent of the population in that service area and remain eligible for 40 MHz of PCS spectrum. This would result in fewer competitive choices for 40 percent of the consumers in that market. This would not achieve our goal of maximizing competitive choices for as many consumers as possible.

E. Post-Auction Divestiture

141. In the Second Report and Order we limited PCS participation by in-market cellular licensees to one 10 MHz PCS license. In its petition for reconsideration, McCaw requests that cellular carriers be permitted to bid for PCS licenses, and to bring their ownership into compliance with the restrictions if they obtain a PCS license for more than one 10 MHz block.[222] This suggestion was supported in replies by Ameritech, Bell Atlantic, Cablevision, Comcast, CTIA, GTE, Sprint, TDS and US West.[223]

142. Decision. We concur with these parties that it would be reasonable to permit incumbent cellular operators, in certain defined circumstances, to divest their cellular interests in order to become PCS licensees. These operators could become eligible for 40 MHz of PCS spectrum by either reducing population overlap or ownership levels to below the standards discussed above. Either could be accomplished before the auction, but that would involve selling the cellular interests on an assumption that the operator would be the successful bidder for a 30 MHz license.

---

[221] See Sprint Petition at 9-10.

[222] See McCaw Petition at 5-6.

[223] See Ameritech Reply at 1-2; Bell Atlantic Reply at 8-9; Cablevision Comments at 7-8; Comcast Petition at 16-17; CTIA Comments at 14; GTE Comments at 8-9; Sprint Reply at 4-7; TDS Comments at 10; US West Reply at 1-2.

143. We also agree with other commenters, including APC, PCS Action and Time Warner,[224] that allowing unlimited divestiture of the cellular interest after the auction raises concerns that abuses could occur during or after the bidding process.[225] If afforded an unlimited opportunity to divest, cellular operators with significant areas of overlap could have incentives to use the bidding process to forestall licensing of new competitors in the market, because the cellular operator would be in control of both a cellular system and one of the three or four possible 30 MHz broadband PCS licenses. There are instances, however, in which such abuses are unlikely to occur. A cellular operator with less than 20 percent population coverage in the PCS service areas would have little incentive to risk incurring penalties for abusing the bidding process when PCS offers greater potential to serve the entire MTA or BTA. These cellular operators have more to gain by broadening their customer base by offering competitive PCS services in place of their overlapping cellular interests in excess of 10 percent than they do by abusing the bidding process to forestall competition. Operators with population overlaps in excess of 20 percent have increasingly greater incentives not to start competitive PCS businesses.

144. We conclude that it is appropriate to allow cellular operators to divest themselves of attributable cellular interests that do not comply with the cellular/PCS cross ownership restriction after winning more than 10 MHz of PCS spectrum in the PCS auctions, provided that the divestiture occurs within the short time frame we set forth below. However, because a cellular operator with significant overlaps may have incentives to delay the rapid introduction of PCS service, we will permit cellular divestiture only for cellular operators that serve less than 20 percent of the PCS service area. If the overlap consists of several cellular licenses, the incumbent may sell some of the licenses and keep others if the result is in compliance with the attribution and population overlap thresholds. This will help achieve our goals of rapid introduction of PCS service and competitive delivery because those entities with cellular operations near a PCS service area may be able to combine the operation into a single efficient operation that would benefit consumers.

145. We have decided to allow the post-auction partial sale of attributable cellular interests so that entities may come into compliance with the cellular eligibility rules. Procedurally, we will require that a PCS applicant that meets the criteria for post-auction divestiture submit with the PCS license application (short-form) a statement that, if successful in obtaining more than 10 MHz of spectrum, it will come into complete compliance with the

---

[224] See APC Reply at 10-11; PCS Action Comments at 15-16; Time Warner Reply at 6-8.

[225] See Letter from APC to the FCC at 2 (May 31, 1994); Letter from PCS Action to the FCC at 2 (May 27, 1994).

cellular/PCS cross-ownership restriction within 90 days of the PCS license grant.[226] If more than 10 MHz is obtained, the long-form application for PCS licensing must be accompanied by a signed statement from the applicant that the cellular property causing the applicant to be in excess of the 10 percent population overlap, or enough equity to bring the entity into compliance with our attribution threshold, will be divested within 90 days of the PCS license grant to bring ownership interest below the permitted attributable ownership limits. If the PCS applicant is otherwise qualified, the PCS application will be granted subject to a condition that the PCS licensee come into compliance with the PCS/cellular cross-ownership rule within 90 days of grant.

146. As a condition of its PCS license, within 90 days of PCS license grant the PCS licensee must certify to the Commission that the applicant and all parties to the application have come into compliance with our PCS-cellular cross-ownership rules. If the PCS licensee fails to submit this certification within 90 days, we will invoke the condition on the PCS license, cancelling it immediately and retaining all monies tendered. In addition, we may investigate whether the certifications on divestiture are evidence of misrepresentations that call into question the party's qualification to hold its cellular license. The PCS licensee may divest the prohibited interest to an interim independent trustee if a buyer has not been secured in the required time frame as long as the applicant has no interest in or control of the trustee, and the trustee may dispose of the license as it sees fit.

V. CONSTRUCTION REQUIREMENTS

147. In the Second Report and Order, we stated our expectations that broadband PCS would be a highly competitive industry and that licensees would have the incentive to construct facilities to meet the demand for service in their licensed areas. We concluded that specific channel loading requirements are unnecessary; however, we required licensees to meet specified construction benchmarks to ensure efficient spectrum utilization and service to the public. Specifically, we required licensees to offer service to one-third of the population in their service area within five years of licensing, two-thirds of the population in their service area within seven years, and 90 percent of the population within ten years. We stated that failure to meet these requirements would result in forfeiture of the license and the licensee would be ineligible to regain it.[227]

---

[226] The Commission shortly will adopt competitive bidding rules applicable to broadband PCS. See Second Report and Order, PP Docket No. 93-253, FCC 94-61, released April 20, 1994.

[227] See Second Report and Order at ¶¶ 132-134.

148. Petitioners' Requests. Several petitioners request reconsideration of the construction requirements and submit a variety of alternatives. In its petition, PacBell supports the five-year and seven-year service area requirements but requests that we eliminate the ten-year, 90 percent population coverage requirement, arguing that the 90 percent coverage requirement is too stringent in view of the PCS power limits. PacBell also argues that a PCS licensee should not have to forfeit its license if it does not meet the construction requirements.[228] Mebtel and RCA also oppose the requirements, arguing that the requirements will adversely affect designated entities.[229] Mebtel recommends that designated entities be allowed ten years to provide service to one-third of the population of their service area and fifteen years to provide service to two-thirds of that population.[230]

149. Some parties, including Alliance and Columbia, recommend that areas unserved for five years be re-licensed to a second party in a manner similar to relicensing of cellular unserved areas.[231] RCA recommends a similar approach, but with a seven-year period before re-licensing.[232] Columbia argues that the use of the "cellular fill-in" model would allow the market to determine the development of PCS. Alliance and Columbia both argue that the fill-in approach would be more equitable to the licensee and more administratively efficient than the current population coverage requirements.[233] Columbia also contends that standards for ascertaining the service area of a PCS system are vague and therefore the Commission's license forfeiture policy will be unenforceable.[234]

150. PNSC recommends excluding all BTA blocks from the construction requirements, and Southwestern Bell recommends excluding the 10 MHz BTA blocks.[235] PNSC recommends a construction requirement for BTA licensees of 20 percent population coverage in five years, 30 percent in seven, and 50 percent in ten years. Southwestern Bell argues that 10 MHz licensees will not be able to provide the same scope of services or realize the same economies of scale as licensees of larger spectrum blocks and recommends that non-

---

[228] See PacBell Petition at 5. See also UTC Petition at 6.

[229] See Mebtel Petition at 3; RCA Petition at 1-2.

[230] See Mebtel Petition at 3.

[231] See Alliance Petition at 6; Columbia Petition at 5; Intelco Petition at 4-7; PCIA Petition at 6.

[232] See RCA Petition at 6-7.

[233] See Alliance Petition at 6; Columbia Petition at 5.

[234] See Columbia Petition at 5.

[235] See PNSC Petition at 10; Southwestern Bell Petition at 2-7.

aggregated 10 MHz licensees be required to meet only a 25 percent population coverage requirement within ten years.

151. Other parties propose other modifications to the population coverage requirements. Sprint recommends permitting cellular PCS providers to count existing cellular population coverage toward the PCS requirements.[236] BellSouth recommends eliminating the population coverage requirements entirely and simply requiring a licensee to build a system within a five-year period.[237] Motorola argues that the current construction schedule, together with the stringent penalty of forfeiture, will limit the development of pedestrian and in-building PCS because licensees will face many economic hurdles and pedestrian PCS would cost more to implement. Motorola requests that we adopt a flexible plan that permits licensees to specify a construction plan with which they must comply to accommodate different system configurations and different coverage situations. Motorola argues that, at a minimum, the license forfeiture policy should be tempered by providing an opportunity for the licensee to demonstrate that its service is satisfactory, regardless of the overall population coverage attained.[238]

152. Responses. A number of parties expressed support for the existing construction requirements. For example, GCI and NYNEX recommend that the Commission maintain its construction requirements to ensure delivery of PCS services as quickly as possible.[239] NYNEX contends that PCS applicants can adjust their bids in the auction process to reflect the difficulties of meeting construction requirements in each market. Northern Telecom also expresses support for the Commission's construction requirements, but proposes that the definition of population served include rural residents where they work or shop, and that the Commission develop guidelines for waivers of the construction requirements.[240] On the other hand, CUC opposes overall relaxation of the construction requirements, arguing that relaxation would delay PCS implementation. It does support adoption of a waiver standard and relaxing the construction requirements in rural areas. CUC further argues that the Commission should not relax its construction requirements if the licensee has the option of partitioning its service area.[241] AIDE argues that if we allow markets to be partitioned, each partitioned market

---

[236] See Sprint Petition at 14.

[237] See BellSouth Petition at iii.

[238] See Motorola Petition at 5-6.

[239] See GCI Comments at 13; NYNEX Comments at 8-9.

[240] See Northern Telecom Reply at 6-9.

[241] See CUC Comments at 7.

should be subject to independent construction requirements.[242] PacBell opposes Sprint's suggestion that cellular carriers be permitted to include their existing coverage in meeting PCS coverage requirements.[243]

153. MCI asserts that some relaxation of the construction requirements is necessary if base and mobile power limits are not substantially increased.[244] US West opposes the 90 percent construction requirement, asserting that 90 percent coverage will increase the cost of PCS fourfold compared to a 67 percent population coverage requirement. It states that a stringent construction requirement is not necessary to prevent warehousing of spectrum because the spectrum will be purchased at auction. As part of its filing, US West submits an analysis of nine large western BTAs that indicates that increasing population coverage from 67 to 75 percent results in only a moderate increase in the geographic area that must be served. On the other hand, increasing population from 75 to 90 percent results in a very large increase in the geographic area that must be covered.[245]

154. Decision. We believe that PCS will be a highly competitive service and that licensees will have incentives to construct facilities to meet the service demands in their licensed service areas. Further, we believe that our use of competitive bidding for PCS licensing and the restrictions on the amount of spectrum that a licensee may control in a geographic area will limit the likelihood that spectrum will be warehoused. Nevertheless, we continue to believe that minimum construction requirements are necessary to ensure that PCS service is made available to as many communities as possible and that the spectrum is used effectively. We note that the Reconciliation Act amendments require the Commission to impose performance requirements.[246] While we agree with GCI, NYNEX, and others that construction requirements are needed to ensure service in a timely fashion, we also agree that relaxation of the requirements is desirable to ensure an economical deployment of the service to promote opportunities for PCS "niche" services, and to facilitate a competitive market.[247]

155. Accordingly, we are amending the construction requirements as follows. All 30 MHz broadband PCS licensees will be required to construct facilities that provide coverage to one-third of the population of their service area within five years of initial license grant and to two-thirds of the population of their service area within ten years. We will require the 10

---

[242] See AIDE Comments at 5.

[243] See PacBell Comments at 8.

[244] See MCI Comments at 17.

[245] See US West Reply at 7-9.

[246] See 47 U.S.C. § 309(i)(4)(B), as amended by the Reconciliation Act.

[247] See GCI Comments at 13; NYNEX Comments at 8-9.

MHz licensees to meet a single construction requirement of providing coverage to one-fourth of the population of their service area within five years; or alternatively, they may submit an acceptable showing to the Commission demonstrating that they are providing substantial service. We recognize that these requirements are less than the requirement for narrowband PCS licensees, but we believe this difference is appropriate given the higher expected construction costs involved for broadband PCS.[248] Moreover, since licensees must purchase their licenses, they will have added economic incentives to construct their systems as rapidly as possible and introduce service to a significant percentage of the population. In this regard, we also believe that these relaxed construction requirements may increase the viability and value of some broadband licenses, especially those in less densely populated service areas. Finally, since most areas are already served by cellular and SMR providers, we believe it unnecessary to require PCS licensees to provide identical or similar services to areas where it is uneconomic to do so. With regard to the 10 MHz licensees, we believe that the reduced construction requirement will make these licenses more attractive to applicants intending to provide residential, cutting-edge niche services or services to business and educational campuses where the population may be small except during business or school hours.

156. At the five-year benchmark we will require all licensees, and again at the 10-year benchmark for 30 MHz licensees, to file a map and other supporting documentation showing compliance with the construction requirements. Licensees failing to meet the population coverage requirements described above will be subject to the license forfeiture penalties adopted in the Second Report and Order.[249] We recognize that even with these requirements, factors such as incumbent microwave operation or sparse population density in some instances could make compliance difficult. In instances where the circumstances are unique and the public interest would be served, the Commission will consider waiving the requirements on a case-by-case basis.[250] These revised construction requirements will ensure efficient spectrum utilization and promote significant nationwide coverage without imposing substantial cost penalties on licensees that serve less densely populated areas. In this regard, we believe that these changes generally address the concerns of those parties that suggested lowering the construction requirements for designated entities or for BTA service areas.[251]

---

[248] The construction requirements for narrowband PCS are set forth in Memorandum Opinion and Order, GEN Docket No. 90-314 and ET Docket No. 92-100, 9 FCC Rcd 1309, 1313-1314, ¶¶ 27-34 (1994), recon. pending.

[249] See Second Report and Order at ¶¶ 133-134.

[250] See WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969).

[251] We will also allow the licensee to use, if they choose to do so, the 2000 census to determine the 10-year construction requirement, rather than the 1990 census specified in the Second Report and Order. This change ensures that licensees will not be required to meet benchmarks based on obsolete data.

157. We also recognize the desirability of encouraging more than one provider to serve a diverse geographic area, and note that resale of a licensee's geographic area to other entities, subject to the licensee's control, is not prohibited by our rules. Accordingly, we recognize that licensees may resell spectrum, and believe that this will facilitate the deployment of PCS. Whether or not the licensee enters into resale arrangements, it will be responsible for insuring that the coverage requirement and all the other requirements of our rules are met. The reseller will not be a separate licensee, but rather, will operate subject to the control of the licensee. We believe that resale will encourage service provision, particularly to rural areas, and allow smaller, predominantly rural companies to participate in PCS. We intend to examine in another proceeding whether resale arrangements confer attributable interests on the reseller. See Section IV, supra.

158. In summary, our relaxed construction requirements will foster provision of PCS services and will promote diversity in their provision. Permitting licensees to resell service subareas, subject to the licensee's control, will permit smaller, rural companies to provide PCS without participating in the competitive bidding process. Finally, we intend to monitor closely the development of PCS in rural and other under-served areas and, if necessary, will readdress these construction requirements to ensure that our goals for wide area service are met.

VI. TECHNICAL STANDARDS

A. Roaming and Interoperability Standards

159. In the Second Report and Order, the Commission provided maximum flexibility in technical standards to allow PCS to develop in the most rapid, economically feasible and diverse manner. Specific technical standards were prescribed only to the extent necessary to avoid harmful interference. The Commission recognized that several industry technical and standards groups were addressing matters related to PCS technical standards. It encouraged those groups to consider ways of ensuring that PCS users, service providers, and equipment manufacturers could incorporate roaming, interoperability and other important features in the most efficient and least costly manner, noting that PCS will be more useful to the extent that users are not limited by geography or by their ability to use their equipment with different systems.

160. Petitioners' Requests. NCS, Motorola, and TIA request that we reconsider our decision not to adopt PCS interoperability requirements.[252] NCS requests that we adopt standards to ensure interoperability and nationwide roaming. It argues that such standards are

---

[252] Texas Emergency also requests that we adopt a uniform standard for enhanced emergency 911 services. These matters are addressed in Section VI.E.

needed for national security and emergency preparedness purposes.[253] Motorola and TIA recommend that we require all equipment used by licensed PCS operators to meet interoperability standards developed by a standards body accredited by the American National Standards Institute (ANSI).[254] Motorola argues that interoperability standards will promote international acceptance of U.S. PCS technology and encourage competition between PCS licensees, since consumers could use the same equipment regardless of the licensee to which they subscribe. TIA states that technical standards are needed to ensure that PCS services are provided at the most competitive prices.[255]

161. Responses. Most responding parties oppose the petitioners' requests that we adopt PCS technical standards. For example, APC, GTE and Northern Telecom express concern that the development of ANSI-approved technical standards would delay the implementation of PCS.[256] MCI and Nextel argue that mandatory standards would inhibit technical advances that would enable licensees to deliver a broad range of services to the public.[257]

162. Decision. We continue to believe that a flexible approach, applying only those standards necessary to prevent interference, is appropriate. As indicated in the Second Report and Order, this will allow PCS to develop in the most rapid, economically feasible and diverse manner.[258] We agree with NCS and others that interoperability for PCS is an important and beneficial goal. We believe, however, that acceptable interoperability is likely to emerge between PCS licenses in a timely manner without our intervention. Our decisions to provide for large regional MTA licenses, to move all PCS licenses to the lower band, and to permit further aggregation of spectrum blocks across geographic regions all foster wide-area roaming and interoperability. In addition, competitive bidding for PCS licenses will facilitate the development of regional or nationwide systems.

163. We also are aware that the industry is now working aggressively to complete several voluntary interoperability standards for PCS in a timely manner. We strongly support these efforts and continue to encourage the industry's work in this area. The availability of interoperability standards will deliver important benefits to consumers and help achieve our

---

[253] See NCS Petition at 2.

[254] See Motorola Petition at 3.

[255] See TIA Petition at 3.

[256] See APC Comments at 15-17; GTE Comments at 13-14; Northern Telecom Comments at 6-9.

[257] See MCI Comments at 21-22; Nextel Comments at 15-16.

[258] See Second Report and Order at ¶¶ 135-138.

objectives of universality, competitive delivery of PCS, that includes the ability of consumers to switch between PCS systems at low cost, and competitive markets for PCS equipment.

164. Interoperability, not only nationwide on one block but also between PCS spectrum blocks, should be in the business interest of all PCS providers. Such broad interoperability will increase the economies of scale in manufacturing PCS equipment such as handsets, will made consumers more likely to subscribe to PCS because they can easily move from carrier to carrier without having to purchase new handsets, and will make it easier for PCS licensees to aggregate blocks of PCS spectrum up to 40 MHz and to create wide-area or national PCS systems. For these reasons, we believe that it is in the public interest for the industry eventually to achieve compatible interoperability standards for all PCS spectrum blocks. Nevertheless, we understand that the industry is not yet ready to arrive at any standard. In addition, we do not want to discourage innovation in designing PCS services. Therefore, at this time we are not mandating that the industry arrive at a single interoperability standard across all PCS spectrum blocks.

165. We intend to monitor the industry's progress in developing and implementing PCS technical standards.[259] In particular, we hope, that some of the standards proposed for PCS will be adopted or near completion at the time of the broadband PCS auction. If we find that the development of PCS technology is not proceeding in a manner that will accommodate roaming and interoperability, we may revisit this issue and consider what actions the Commission may take to facilitate the more rapid development of appropriate standards. Finally, to facilitate international acceptance of U.S. PCS technology, we will be receptive to requests seeking our endorsement of completed ANSI standards, provided that such endorsement does not limit the flexibility of PCS licensees to select standards and technologies best suited to their needs.

B. PCS Power Limits

166. In the Second Report and Order, the Commission established a maximum e.i.r.p. of 100 watts and a maximum antenna height above average terrain (HAAT) of 300 meters for PCS base stations.[260] The Commission recognized that most PCS experimental systems operated at a maximum power of 10 watts e.i.r.p., but adopted a limit of 100 watts e.i.r.p. for base stations to permit additional flexibility in the design of PCS systems. It also specified a maximum power limit of 2 watts e.i.r.p. for mobile units.

---

[259] We will be conducting a comprehensive review of the CMRS market on an annual basis. See CMRS Second Report and Order. In that context we may review PCS interoperability and standardization issues.

[260] See Section 24.231 of the Commission's Rules. Antenna heights up to 2000 meters are permitted with a corresponding reduction in power.

167. Petitioners' Requests. Eleven parties filed petitions for reconsideration requesting increases in the PCS power limits. APC, Ameritech, MCI, Motorola, Northern Telecom, PacBell, PacTel, PCIA, Sprint, Time Warner and US West argue that higher-powered PCS base stations should be permitted. The majority of these petitioners request that the power limit of a PCS base station be increased to 1640 watts e.i.r.p.[261] These parties state that permitting higher power will allow PCS providers to use large cells and deploy advanced technologies, take advantage of high gain antenna technology, more effectively compete with cellular, and better cover rural areas. Time Warner and PacBell recommend that no limit be placed on power and argue that the 100 watt limit will not allow economic deployment of PCS.[262]

168. In requesting an increase in the power limit, PacBell and Northern Telecom indicate that most base stations would actually operate using low power transmitters coupled with high gain, directional antenna systems that boost the radiated signal levels.[263] Ameritech, MCI, Sprint, US West and others also support the use of high-gain antenna technology. They submit that the same antennas are also used to receive signals from subscriber units, amplifying the level of the received signal. Thus, a low power transmitter using a high gain antenna at the base station permits the system to remain "balanced," allowing low power subscriber units to communicate with the base station over the larger coverage area provided by the higher radiated base station power.[264] The petitioners, for example APC, Northern Telecom, and PacBell, argue that human exposure to radio frequency energy (RF) can be controlled through the design of the base station and the requirements of the current regulation of biohazards can be met independent of the overall transmitter power limit set by the Commission.[265]

---

[261] Many of the petitioners request the power be increased to 1000 watts e.r.p., which is equivalent to 1640 watts e.i.r.p. By comparison, the cellular rules permit the power of a base station to be up to 500 watts e.r.p. See 47 C.F.R. § 22.904. Equivalent isotropically radiated power is the product of the power supplied to the antenna and the antenna gain in a given direction relative to an isotropic antenna. Effective radiated power is the product of the power supplied to the antenna and its gain relative to a half-wave dipole in a given direction. See 47 C.F.R. § 2.1.

[262] See Time Warner Petition at 13; PacBell Petition at 13.

[263] See PacBell Petition at 3; Northern Telecom Petition at 5.

[264] See Ameritech Petition at 2; MCI Petition at 2; Sprint Petition at 15; US West Petition at 12-13.

[265] Increasing the separation between individuals and the antenna, using high gain antennas at the base station, and other techniques can be used to meet limits on human RF exposure. See APC Petition at 6-7; Northern Telecom Petition at 5; PacBell Petition at 4.

169. In their petitions, MCI and PCIA also request that we increase the maximum power limit for certain types of mobile and portable units from 2 to 20 watts e.i.r.p.[266] They argue that this would permit the use of higher power for PCS vehicular-mounted units and special types of non-handheld equipment such as pay telephones installed at special events, emergency restoration telephone systems, and telephones installed in areas where landline facilities are not available or justifiable due to intermittent use.[267]

170. Responses. The majority of the responding parties support the petitioners' requests that the power limit be raised.[268] These parties state that operation at higher power levels would decrease the number of base stations required for coverage, especially in sparsely populated areas. They further submit that the larger coverage area provided by higher power operation will also facilitate compliance with the construction requirements, thereby lowering operating costs.

171. On the other hand, AT&T indicates that the European Telecommunications Standards Institute (ETSI) recently rejected a similar proposal for increased power for the "DCS 1800" standard,[269] and limited base station transmitter output power to 40 watts and mobile transmitter power to 1 watt. AT&T argues that an increase in base station power limits is unnecessary without a corresponding increase in handset power limits, which leads to more expensive handsets that are heavier, have a shorter battery life, and interfere with other electronics.[270] Apple and Rolm request that we limit the e.i.r.p. of all transmitters operating on channels adjacent to the unlicensed band to no more than 2 watts to limit interference to unlicensed devices.[271] Nextel states that higher power limits would only encourage PCS providers to duplicate cellular service rather than develop new services.[272] TDS, UTC and others argue that any increase in the power limit should not result in increased interference

---

[266] A power of 20 watts e.i.r.p. is equivalent to 12 watts e.r.p.

[267] See MCI Petition at 7-8; PCIA Petition at 8.

[268] See APC Comments at 20-21; Bell Atlantic Comments at 14; CUC Comments at 12; GCI Comments at 2-3; MCI Comments at 18-19; Murray Comments at 6; Northern Telecom Comments at 3-6; Omnipoint Comments at 4, 13; and PacBell Comments at 1-3.

[269] DCS 1800, which operates in the 1800 MHz region of the spectrum, is an extension of the pan-European digital cellular standard, "Global System for Mobile Communications" (GSM).

[270] See AT&T Reply at 6.

[271] See Apple Comments at 4-5; Rolm Reply at 2.

[272] See Nextel Comments at 15.

from PCS systems to other radio services.[273] API opposes increasing the power level of subscriber units absent strict coordination requirements.[274]

172. Decision. We believe that increasing the maximum base station power limit to 1640 watts e.i.r.p. will improve PCS licensees' ability to configure their systems to best serve the needs of their customers and to compete with other mobile services such as cellular and wide-area SMR. Higher power will allow individual PCS base stations to serve larger geographic areas more effectively. We believe that the ability to serve larger geographic areas will also promote our goal of service to less populated areas. The flexibility to use higher power will provide PCS system operators greater flexibility in determining system architecture, i.e., the number of base stations deployed to serve a given area, based on service demands rather than adequate coverage considerations. This change will also facilitate the use of new technologies, such as high-gain, directional antennas, as well as potential improvements to the design of subscriber products. We do not agree with Apple and Rolm that PCS operations on channels adjacent to the unlicensed spectrum should be limited to two watts. We see no reason to restrict licensed PCS operations to afford additional protection to unlicensed devices. Such a limit would be detrimental to licensed PCS services and unfairly disadvantage blocks A and C that are adjacent to the unlicensed spectrum. In addition, we note that unlicensed operations will be relatively short range and therefore can be designed to resist adjacent channel interference. Accordingly, we are amending the rules to allow PCS base stations to operate with up to 1640 watts e.i.r.p. We are also amending PCS power/HAAT coordination distance requirements to reflect this increased maximum power level.

173. While we believe that the power limit for base stations should be increased to 1640 watts e.i.r.p., this increase in power should not be used in such a manner that the resulting PCS system becomes unbalanced so that mobile units are unable to communicate with the base station. To ensure balanced base-to-mobile and mobile-to-base communications, we are also limiting the transmitter output power of the base station to 100 watts. By limiting the transmitter output power as well as e.i.r.p., we intend to promote the use of the high gain, directional antennas to achieve the larger coverage areas sought by the petitioners.

174. We disagree with those parties requesting higher power for certain mobile and portable units. A lower power output limit minimizes exposure to radio frequency energy, see infra Section VIII. Further, we agree with API that increasing the power output limit for subscriber units would necessitate unreasonably stringent and unenforceable coordination requirements. Unless the location of such higher power mobile units could be strictly controlled, interference could result to fixed microwave operations and/or to other PCS

---

[273] See e.g., TDS Supplemental Comments at 1-2; UTC Comments at 14-16.

[274] See API Comments at 4.

systems in adjacent service areas. For these reasons, we are not increasing the maximum power limit for mobile and portable PCS transmitters as requested by MCI and PCIA.

C. Protection of Fixed Microwave Operations

175. In the Second Report and Order, the Commission stated that a principal concern in the authorization of PCS in the 2 GHz band is that existing fixed microwave operations be protected.[275] It adopted the following approach for providing such protection: 1) required PCS licensees to provide the same level of protection to microwave operations that they currently provide under Part 94 of our Rules and through the use of EIA/TIA Bulletin TSB10-E criteria and methodology;[276] 2) specified antenna height and power limits for PCS; 3) adopted requirements for PCS licensees to coordinate with fixed microwave operators; and, 4) provided methods for calculating interference from PCS to incumbent microwave operations.[277]

176. Specifically, in the Second Report and Order, we adopted carrier-to-interference criteria for protection of short and medium length microwave links of 25 km (about 15 miles) or less. For path lengths longer than 25 km, where reliability is more dependent on the relative noise threshold and faded signal level, we limited the level of an interfering signal to that which would cause a 1 decibel (dB) degradation in the signal-to-noise ratio for analog systems or which would cause an increase in bit-error-rate (BER) from 10^{-6} to 10^{-5} for digital systems. Finally, we endorsed procedures for calculating interference to microwave operations.[278]

177. Petitioners' Requests. Ten parties request reconsideration of issues relating to protection of microwave operations.[279] Several parties request reconsideration of our decision

---

[275] See Second Report and Order at ¶ 141.

[276] Cf. 47 C.F.R. § 94.63. We also stated that, as under Part 94 of our rules, other acceptable industry-developed interference procedures, such as those developed by the EIA, the Institute of Electrical and Electronics Engineers (IEEE) and the ANSI, may be used in performing interference analyses. See Section 24.237(d) of the Commission's Rules.

[277] See Second Report and Order at ¶ 141-145, 163-174.

[278] The procedure for calculating the level of PCS signals at microwave receivers requires that the PCS licensee compute the sum of the transmitters' powers from proposed PCS base stations and all portable and mobiles associated with the base stations at each microwave receiver within the coordination distance of the base stations. See Second Report and Order, Appendix D.

[279] The parties requesting reconsideration of these matters include: Alcatel, APC, API, Ameritech, Bell Atlantic, Blooston, Motorola, TIA, PCIA and UTC.

to use Bulletin TSB10-E. These parties request that the Commission adopt newly developed industry standards for protection of fixed microwave stations from PCS. Specifically, Alcatel, APC, API, Ameritech, Motorola, TIA and PCIA recommend using EIA/TIA Bulletin TSB10-F when it is completed, instead of the procedures in Appendix D of the Second Report and Order.[280] TIA argues that Bulletin TSB10-F, when adopted, will likely be the benchmark industry standard for determining PCS-microwave interference. API supports using TSB10-F as the only method, and states that allowing a number of calculation methods is unwise and will create needless uncertainty. Alcatel, Motorola, PCIA, and TIA also request that we clarify the rules to indicate that other appropriate interference procedures developed by the industry may be used.[281] A number of the petitioners also suggest specific changes to the procedures in Appendix D of the Second Report and Order.

178. Motorola, TIA, and PCIA object to the use of the Longley-Rice propagation model that was stipulated for interference calculations at Appendix D of the Second Report and Order.[282] TIA states that there are technical problems with the use of "urban correction factors" with the Longley-Rice model, as adopted by the Commission. Instead, they recommend that an appropriate model accepted by industry be used. For example, Motorola and PCIA argue that the propagation model in TSB10-F represents the efforts of all affected groups and should be adopted.[283]

179. Bell Atlantic suggests that we adopt rules to eliminate "excess margin" in microwave systems.[284] It argues that such excess fade margin is not needed for reliable microwave communications and reduces the amount of available spectrum to PCS operators. Bell Atlantic also recommends that we require microwave licensees to upgrade their systems when the change will reduce interference and when the PCS operator is willing to pay for the upgrade.

180. UTC asserts that the current PCS rules are contradictory. It notes that the rules provide for blanket licensing of all transmitters in a service area and at the same time require an engineering analysis before filing an application for a new or modified facility. UTC suggests that Section 24.11 be clarified to state that despite receiving a blanket license,

---

[280] See Alcatel Petition at 4-5; APC Petition at 8; API Petition at 6; Ameritech Petition at 2-3; Motorola Petition at 6-7; TIA Petition at 6-11; PCIA Petition 7, 10-12.

[281] See Alcatel Petition at 5-6; APC Petition at 11; TIA Petition at 10-11.

[282] See Second Report and Order at Appendix D.

[283] See Motorola Petition at 7; TIA Petition at 11; PCIA Petition at 12.

[284] See Bell Atlantic Petition at 22. Microwave systems are typically designed with additional power or signal strength, called margin, to provide for attenuation of the signal due to changes in propagation or weather conditions that may occur.

licensees will need separate applications and authorizations for each station to assure that the proposed facility will not cause interference to existing microwave stations. UTC also recommends that we adopt coordination procedures based on Part 21 of our Rules and that all coordination requests be in writing.[285] API recommends that we require formal coordination by a third party.[286]

181. API requests that we specify sanctions for PCS licensees that cause interference to incumbent fixed microwave operations. Specifically, API recommends that we require PCS entities to cease operation upon notification of interference by a microwave licensee, establish a scale of significant fines and/or forfeitures to deter violations, and make available expedited procedures to ensure that complaints are resolved quickly.[287] Blooston argues that the PCS rules fail to protect common carrier microwave operations in the adjacent 1990-2110 MHz band and should therefore be reworked to extend this protection.[288]

182. Responses. The responding parties generally support the use of EIA/TIA Bulletin TSB10-F and recommend that we adopt this standard when it is completed.[289] TDS states that although Appendix D may initially be used, improvements involving propagation modeling and urban correction factors need to be addressed. UTC supports giving equal consideration to either the interference standard found in Appendix D or a standard developed by a recognized authority. AAR states that it supports TIA's proposal that we adopt an industry consensus with Bulletin 10-F, provided that fixed microwave licensees are provided the same level of protection as under the current standard, Bulletin 10-E. PacBell states that we should adopt the Okumura-Hata propagation model, arguing that this model provides more realistic estimates. PCIA concurs that the Longley-Rice model should not be the only propagation model permitted if the industry can agree on the use of other models.

---

[285] See UTC Petition at 16-17. These procedures are set forth at 47 C.F.R. § 22.100.

[286] See API Petition at 7.

[287] See API Petition at 8.

[288] See Blooston Petition at 2.

[289] See Alcatel Comments at 2-4; APC Comments at 22; API Comments at 3; AAR Comments at 3-4; TIA-NED Comments at 2-6; MCI Comments at 19-20; TDS Supplemental Comments at 3; PacBell Comments at 3-4; PCIA Comments at 9.

183. Some parties support UTC and API's recommendation that we adopt prior coordination procedures, arguing that this would insure that all potential issues of interference are resolved prior to licensing and deployment.[290] MCI opposes API's proposal for a formal third-party coordination requirement, arguing that such a requirement would create delays in implementing PCS.[291]

184. Several commenters support Bell Atlantic's proposal to require microwave licensees to upgrade their system when it is shown that an upgrade will reduce interference and the PCS operator is willing to pay for the upgrade. API disagrees with those parties that argue that interference protection margins used for microwave systems are excessive. Alcatel does not oppose elimination of "excess margins," but asserts that neither the Commission nor an industry standards group should define what constitutes an excess margin. It states that instead, these objectives should be determined by individual users through interaction with appropriate frequency coordinators and potentially affected users.[292]

185. UTC supports API's proposal for penalties to deter creation of objectionable interference to microwave users. It argues that such penalties would cause PCS proponents to use caution and would therefore help to avoid interference situations. MCI opposes API's request for sanctions on PCS licensees causing interference. It argues that API's proposal would give microwave licensees undue power to shut down PCS operations merely by notifying the licensee that it has detected objectionable interference.

186. Decision. In the Second Report and Order, we stated that with certain modifications, the level of protection provided under Part 94 of our rules and through application of TSB10-E criteria and methodology is appropriate and will provide adequate protection to microwave users from PCS operations. We also stated that we would accept the new TSB10-F procedures, when adopted by EIA/TIA, for use in demonstrating compliance with our technical standards for PCS to fixed microwave interference.[293] Although many parties request that operators be required to use TSB10-F exclusively instead of that set out at Appendix D of the Second Report and Order, we cannot adopt this standard as the only acceptable method for determining interference to microwave operations from PCS operations until we have had a chance to evaluate its merits and provide it to the public for comment.

---

[290] See AAR Comments at 4; Alcatel Comments at 3; API Comments at 3-4.

[291] See API Petition at 2-4.

[292] See Alcatel Reply at 3-4.

[293] TSB10-F was adopted on May 31, 1994; TIA Telecommunications Systems Bulletin Number 10-F, Interference Criteria for Microwave Systems, May 1994, (TSB10-F). On June 1, 1994, TIA submitted a Supplement to Petition for Reconsideration to report that TSB10-F is now a standard adopted by an ANSI-accepted body.

Therefore, we will maintain the procedures adopted in the Second Report and Order with some modifications.[294]

187. We concur that a prior coordination procedure is necessary to ensure that potential issues of interference are resolved before deployment of PCS systems.[295] We believe that the Part 21 coordination requirements are appropriate for coordination of PCS and microwave facilities. These coordination procedures are generally familiar to the parties involved and are sufficient to address potential interference problems. Accordingly, we will amend the PCS rules to include coordination procedures similar to those contained in Part 21. We note that coordination under Part 21 does not require written notification. We find no reason to require that the PCS-to-microwave coordination be treated differently.

188. We agree with Bell Atlantic that permitting PCS entities to pay for and upgrade incumbent microwave operation, such as providing better antennas or filters that would prevent interference, would facilitate the implementation of PCS. Specifically it would provide more choices and opportunity for sharing between the two services. However, we believe that mandating such upgrades of the incumbents' facilities would be difficult to regulate. Therefore, we will allow for such upgrades when all parties agree but will not mandate them.

189. We share Bell Atlantic's concern that excess fade margins in incumbent systems will inhibit the ability of PCS entities and microwave operations to share spectrum. However, we also recognize that microwave systems vary in size, complexity and degree of reliability needed. Therefore, we see no way of adopting general rules mandating an acceptable fade margin that would apply fairly in all cases. Accordingly we will not set limits on the amount of allowable fade margin in a microwave system. We suggest, however, that incumbent licensees limit the fade margin in their systems to only that necessary for reliable service so as to help facilitate the implementation of PCS.

190. Regarding Blooston's assertion that Section 24.233 does not provide protection to common carrier point-to-point microwave radio service (PPMRS) operations in the 2110-2130 MHz and 2160-2180 MHz bands, we note that our Rules contain out-of-band radiation

---

[294] While we continue to believe the procedures adopted in the Second Report and Order are accurate and reliable, parties may use other methods such as TSB10-F as alternative methods. As indicated in the Second Report and Order, if both the PCS entity and the incumbent microwave entity agree to an alternative criteria for interference protection, then that criterion may be used. See Second Report and Order at n.118. We continue to believe that this flexibility is desirable, in light of the varied technologies that may be used for PCS.

[295] We note that we recently adopted Part 21 coordination procedures in the Emerging Technologies proceeding for 2 GHz microwave facilities that will be relocated to higher bands. See Second Report and Order, ET Docket No. 92-9, at ¶ 60.

limits that must be met by PCS entities. We also note that under our revised allocation PCS is only allocated spectrum in the 1850-1990 MHz band, so there is 120 MHz of separation between PCS and PPMRS operations.

191. With regard to Blooston's request that we require PCS licensees to protect common carrier microwave operations in the adjacent 1990-2110 MHz band, we note that the current PCS rules provide for strict out-of-band emission limits.[296] We believe that these limits are sufficient to protect microwave operations in adjacent bands and, therefore, will not adopt any additional coordination or protection requirements for PCS operations.

192. We disagree with UTC that PCS licensees should be required to submit separate applications and obtain separate authorizations for each transmitter in their system. The information that would be submitted on these applications is unnecessary to the Commission, and its filing would be overly burdensome for PCS licensees. We believe that UTC's concerns are adequately addressed through our requirements for coordination.

193. Finally, we deny API's request for a rule automatically imposing penalties on PCS operations that interfere with fixed microwave users. We believe that such penalties are unnecessary and inappropriate. As we stated in the Second Report and Order, a principal concern in the authorization of PCS in the 2 GHz band is that existing fixed microwave operations be protected.[297] If interference were to occur, we would expect the PCS licensee to take appropriate action to resolve that interference. In cases where the PCS licensee did not take appropriate action, we believe our current remedies, either forfeitures or revocation of licenses, are sufficient.

D. PCS-to-PCS Interference Standards

194. In the Second Report and Order, the Commission established a limit for spurious emissions appearing outside of the spectrum allocated to PCS.[298] No limit was specified for spurious emissions appearing within the PCS spectrum. The Commission also adopted minimal standards for PCS transmitter frequency stability, stating only that the stability must

---

[296] See Section 24.234 of the Commission's Rules.

[297] See Second Report and Order at ¶ 141.

[298] Spurious emission is defined as an emission on a frequency or frequencies which are outside the necessary bandwidth and the level of which may be reduced without affecting the corresponding transmission of information. Spurious emissions include harmonic emissions, parasitic emissions, intermodulation products and frequency conversion products, but exclude out-of-band emissions. See 47 C.F.R. § 2.1. See also Section 24.234 of the Commission's Rules.

be sufficient to ensure that the fundamental emission remains within the authorized frequency block.[299]

195. Petitioners' Requests. Motorola and PCIA request reconsideration of several aspects of the PCS-to-PCS interference standards. First, in order to reduce the potential for interference between adjacent PCS channel blocks, Motorola and PCIA request that the same limit be applied to all spurious emissions appearing outside a licensee's channel block, regardless of whether the emissions appear inside or outside of the bands allocated to PCS. Second, Motorola and PCIA ask that we specify the resolution bandwidth of the instrumentation used to measure spurious emissions.[300] Third, Motorola requests clarification as to whether the limit on spurious emissions contained in Section 24.234(a) applies only for type acceptance of the transmitter or to the system as installed.[301] Finally, Motorola asks that we clarify how a manufacturer must show compliance with the frequency stability requirement.

196. Responses. APC, Ericsson, and Northern Telecom support the requests for extension of the spurious emission limit to frequencies within the PCS spectrum. Ericsson and Northern Telecom also support the requests to specify the measurement bandwidth for spurious emissions.[302] Apple, Ericsson, and Rolm recommend that even tighter limits be imposed on spurious emissions appearing in the unlicensed PCS bands from licensed PCS transmitters. They state that such limits are needed to reduce potential interference to unlicensed devices.[303]

197. Decision. We concur that limits on spurious emissions outside of the frequency block employed by a PCS licensee are needed to reduce the potential for harmful interference to other PCS operations as well as other radio services operating on spectrum outside of the PCS bands. Accordingly, we are amending the rules to indicate that the spurious emissions limits apply to emissions appearing on all frequencies outside of the frequency block employed by a licensee. We are also clarifying that, when testing to show compliance with the spurious emission limits, the fundamental emission from the transmitter must be located as

---

[299] See Section 24.235 of the Commission's Rules.

[300] PCIA recommends a bandwidth of 1.0 percent of the emission bandwidth. See PCIA Petition at 3-4; Motorola Petition at 10.

[301] PCIA also points out that Section 24.234(a) should be corrected to indicate that the symbol "P" refers to "watts." See PCIA Petition at 4.

[302] See APC Comments at 23; Ericsson Reply at 2-4; Northern Telecom Comments at 10-11.

[303] See Apple Comments at 4-5; Ericsson Reply at 3.

close the edge of the adjacent band as the transmitter is designed to operate. This will ensure that the emission limits are met under all normal operating conditions.

198. We do not agree that the limits for spurious emissions should be further restricted when those emissions fall within the frequency bands allocated for unlicensed PCS devices. Apple, Ericsson and Rolm have not provided information indicating that additional attenuation, beyond that already provided under the rules, is necessary to prevent harmful interference.

199. We agree that the standards for measuring spurious emissions need to be clarified. The measured levels of spurious emissions are dependent, to an extent, on the bandwidth of the measuring instrument. Specifying a minimum resolution bandwidth will eliminate confusion within the rules and provide repeatable measurement results. However, we disagree with PCIA's proposed bandwidth of 1.0 percent of the emission bandwidth. Limits are placed on spurious emissions in order to reduce the potential for causing harmful interference. Ideally, the resolution bandwidth of the measuring instrument should be adjusted as close as possible to the bandwidth of the receiver for which interference protection is being provided.[304] Near the frequency bands employed for PCS, typical receiver bandwidths can range from tens of kilohertz to several megahertz. Since the resolution bandwidth on most measuring instruments does not go above 1 MHz, this is typically the bandwidth employed by the Commission when measuring spurious emissions above 1000 MHz.[305] We believe that the use of a resolution bandwidth of 1 MHz is also appropriate for PCS equipment and are amending the rules to add this specification.

200. In response to Motorola's question regarding on the applicability of the spurious emissions regulations, these limits apply to both the transmitter, as tested during type acceptance, and the operating system, as installed by the licensee. We recognize that the level of the spurious emissions can be affected by the type of antenna employed by a licensee. It is for this reason, among others, that the Commission also may require a licensee to provide additional attenuation to spurious emissions, even beyond those limits stated in the regulations, when these emissions cause harmful interference to other users of the RF spectrum. We are further clarifying the rules to note that additional attenuation can be required under such circumstances.

---

[304] Measurements with a narrower resolution bandwidth would result in lower values for the measured spurious emissions and increase the potential for harmful interference.

[305] There are a few exceptions to this criteria for some of the narrowband licensed services, such as the cellular service. See 47 C.F.R. § 22.907(j).

201. The measurement procedures for testing frequency stability are already specified in the regulations.[306] As the frequency stability standard requires only that the fundamental emission stay within the authorized frequency block, the transmitter must be tested with the fundamental emission located as close to the edge of the authorized frequency block as the transmitter is designed to operate in order to demonstrate compliance under all normal operating conditions.

E. Enhanced 911 Standards

202. In its petition for reconsideration, Texas Emergency requests that we mandate a single enhanced 911 (E-911) standard. It requests that a uniform standard be adopted for all wireless technologies and that PCS licensees be required to provide accurate location information about 911 callers from the outset of service. The term "enhanced 911" generally refers to a 911 emergency system that, among other features, automatically provides 911 operators with a caller's exact location without the caller having to provide his or her location.[307] No responding parties opposed this request, although several did raise concerns about imposing such requirements. In the Second Report and Order, we indicated that we would address matters relating to enhanced 911 (E-911) capability in PCS, cellular, and other mobile services in a future rule making proceeding.[308] We note that the development of an E-911 standard will necessitate consideration of issues affecting matters beyond PCS and therefore is more appropriately addressed in a separate proceeding. We expect to begin this proceeding shortly and will address Texas Emergency's request at that time.

VII. UNLICENSED PCS

A. Spectrum Allocation

203. In the Second Report and Order, the Commission allocated 40 MHz of spectrum for unlicensed PCS devices. The 1900-1920 MHz band was designated for asynchronous (primarily data) devices, and the 1890-1910 MHz and 1920-1930 MHz band was designated for isochronous (primarily voice) devices. The Commission concluded that this 40 MHz of

---

[306] See 47 C.F.R. § 2.995.

[307] In the existing 911 system, automatic location identification is easily accomplished because the location is known of each telephone in the wired telephone network. Location information is not so easily determined in a wireless network because the caller can be located anywhere in the network's service area. In such networks, however, a caller's location can be approximated by determining which of the network's radio transmitters is communicating with the caller. In the existing cellular system such approximations typically could be accurate only to within a few square miles.

[308] See Second Report and Order at ¶ 139.

spectrum would be sufficient to meet the demands of both nomadic and non-nomadic data and voice applications. Further, it noted that this band plan provides both asynchronous and isochronous operations an equal share of the 1910-1930 MHz band, which has fewer incumbent fixed microwave facilities that must be relocated before full use of the band can be made for unlicensed PCS.

204. Petitioners' Requests. On September 13, 1993, Apple submitted an "Emergency Petition" addressing the spectrum allocated for unlicensed data PCS devices.[309] Apple argues that since data PCS operations primarily will be nomadic in nature -- that is, the devices will be mobile in nature and their location cannot be controlled or predicted. Such operations should be allocated the more lightly loaded 1910 to 1930 MHz portion of the spectrum set aside for unlicensed devices. Apple contends that, unlike nomadic data devices, unlicensed voice devices ordinarily will operate through a base station and can be coordinated with existing microwave operations. Due to the greater number of microwave operations that must be moved, Apple states that the current allocation significantly increases the time and cost of implementing nomadic data PCS.[310] Apple further argues that allocation of 1890 to 1910 MHz to isochronous voice operations would serve the interests of many voice technologies because of the desirability of contiguous spectrum. Separate petitions supporting Apple's position also were filed by Lace and SpectraLink.

---

[309] See Apple Petition, passim. Apple's petition was filed three days before the sunshine cut-off date for the filing of ex parte presentations comments in this proceeding. To allow full comment and consideration of the issues raised by Apple, on October 22, 1993, the Commission requested public comment on Apple's petition. In its petition, Apple requested that the more lightly encumbered 1910-1930 MHz band be allocated for the exclusive use of nomadic data PCS devices and certain nomadic voice devices, including consumer cordless telephones. Apple also requested that an additional 20 MHz of spectrum be allocated adjacent to the 1910-1930 MHz band for the use of devices that can be coordinated. It further requested that two or more additional 10 MHz bands in the 1850-1990 MHz band be reserved for at least five years to accommodate retuned microwave incumbents from the licensed and unlicensed PCS bands. In subsequent comments, Apple stated that certain of its initial concerns were rendered moot by the Commission's decision in the Second Report and Order, and its only remaining concern was that the 1910 to 1930 MHz band be allocated for data or asynchronous devices.

[310] Id. Apple also suggests that due to the potential for adjacent channel interference, nomadic devices may be required to observe 4 MHz guard bands. It states that this will effectively limit the 10 MHz of easily cleared spectrum available under the Commission's plan to 2 MHz. Apple states that under its plan unlicensed data PCS devices would be given the entire lightly loaded 20 MHz, and therefore would have up to 12 MHz of usable spectrum by employing two 4 MHz guard bands.

205. Responses. Several responding parties oppose the petitioners' requests and support the current allocation scheme for unlicensed voice and data operations. For example, APC, AT&T, HP, Motorola, Northern Telecom and PacBell support the current plan and point out that providing data and voice with equal amounts of the lightly encumbered spectrum is fair and balanced. They argue that the Apple plan would unfairly penalize isochronous voice interests by allocating to them all of the heavily used microwave spectrum.[311] UTAM states that it is neutral on this issue, but points out that Apple's proposed allocation scheme will increase the cost of clearing the isochronous (voice) band and decrease the cost of clearing the asynchronous (data) band.[312]

206. BSA, Compaq, Ericsson, Metricom, Microsoft, Rolm and SpectraLink support the petitioners' proposed changes to the unlicensed allocation. BSA and Compaq argue that the Commission's band plan imposes initial costs for clearing the bands for data PCS that are significantly higher than those for Apple's plan. They point out that the manufacturers of devices that may be coordinated with existing facilities can more readily bear the higher costs of band clearing such costs can be absorbed incrementally using the cash flows generated by early deployment.[313] Ericsson, Rolm and SpectraLink argue that the long-term spectral efficiency advantages of 20 MHz of contiguous spectrum for voice operations outweigh the short-term band clearing problems.[314]

207. Decision. As noted above, we have amended the allocation and frequency plan for licensed PCS. Under this reallocation the amount of spectrum provided for unlicensed PCS devices is reduced from 40 to 20 MHz. Specifically, the 20 MHz of unlicensed PCS spectrum at 1890-1910 MHz is being reallocated to licensed PCS operations. Our decision to reallocate this spectrum preserves the 1910-1930 MHz band for unlicensed devices. We note that this band is the most lightly loaded portion of the PCS spectrum and is the spectrum where most unlicensed equipment was expected to operate initially. Further, since unlicensed operations are restricted to very low power, they should be able to share or "reuse" the available spectrum very efficiently. Accordingly, we believe that this reduction will not have a major effect in the near term on devices that will be able to operate on the unlicensed PCS bands. As noted above, in the near future we will initiate a proceeding to consider allocation of additional spectrum to meet long term spectrum requirements for unlicensed PCS devices.

---

[311] See APC Comments at 5-7; AT&T Reply at 4; HP Comments at 3; Motorola Reply at 3; Northern Telecom Comments at 3-4; PacBell Reply at 2.

[312] See UTAM Comments at 10-11.

[313] See BSA Comments at 5-9; Compaq Comments at 5.

[314] See Ericsson Reply at 3-4; Rolm Reply at 1; SpectraLink Comments at 3-4.

208. Taking into account this reduction in the total amount of spectrum available for unlicensed operations, we find that the interests of all concerned parties would be best served by retaining the plan to provide 10 MHz at 1910-1920 MHz for asynchronous or data devices, and 10 MHz at 1920-1930 MHz for isochronous or voice devices. We believe that this approach is balanced and treats both voice and data proponents fairly and equitably. We also believe that this approach will encourage the clearing of all existing microwave users from the entire 1910-1930 MHz band, thereby permitting the rapid introduction of nomadic voice and data devices. Accordingly, we are amending our spectrum plan for unlicensed devices, as indicated above.

B. Coordination

209. In the Second Report and Order, the Commission designated UTAM as the coordinating body to manage the transition of spectrum from fixed microwave to unlicensed PCS. The Commission conditioned this designation on UTAM's submission and our acceptance of: 1) a funding plan that is equitable to all prospective manufacturers of unlicensed devices, and 2) a plan for band clearing that will permit the implementation of nomadic devices, in particular, nomadic data PCS devices, as promptly as possible.[315] We stated that UTAM would be responsible for administering the transition, including negotiating costs of relocation, ensuring that comparable facilities are provided, and resolving disputes of interference to fixed microwave from unlicensed PCS operations. Further, we required that any unlicensed PCS device or system be coordinated through UTAM before being initially deployed or subsequently relocated. We required that all applicants for FCC equipment authorization of unlicensed PCS devices, be participants in UTAM.

210. Petitioners' Requests. In its petition, Apple maintains that UTAM does not adequately represent the interests of the unlicensed data community.[316] It contends that unless we intervene with additional guidance, UTAM is unlikely to adopt and implement a band-clearing plan that will ensure the earliest possible deployment of nomadic data devices. Apple requests that we remove the specific references to UTAM in the rules and that we state that we will designate another entity if UTAM fails to submit an acceptable funding and band-clearing plan.

211. Apple also requests that we provide for conditional technical approvals of unlicensed nomadic equipment (i.e., equipment that cannot be coordinated) in advance of complete clearing of the spectrum.[317] It further requests that the labeling requirements for unlicensed equipment be eliminated once the spectrum has been cleared and coordination is no

---

[315] See Second Report and Order at ¶ 88.

[316] See Apple Petition at 3.

[317] See Apple Petition at 3.

longer needed.[318] UTC, in its petition, maintains that the definition of "coordinatable PCS device" is too vague.[319] UTC also requests that the equipment labels be more specific to let users know that unlicensed devices cannot be relocated without coordination, and that a toll-free number be placed on the label so that users can contact UTAM.

212. In its petition, UTAM asks that we clarify whether the burden of determining whether a device is coordinatable lies with itself or with the Commission.[320] UTAM notes that the rules currently appear to make UTAM responsible for such determinations.[321] It states that the responsibility for determining whether a device is coordinatable should be determined through the Commission's equipment authorization program. UTAM further requests that the rule requiring that it verify the location of coordinatable PCS devices be interpreted to allow such verifications to be made through any method that adequately identifies the location of a device, including the reports of licensed installers.[322] Ericsson, in its petition, requests that we clarify the types of showings that will be necessary to demonstrate compliance with the requirement to either prevent activation of equipment or to disable its use upon relocation without prior coordination with UTAM.[323]

---

[318] Section 15.311 of the rules requires that unlicensed PCS devices, in addition to the general Part 15 labeling requirements, include a prominently located label with the statement that installation of the equipment is subject to notification and coordination with UTAM. See Section 15.311 of the Commission's Rules.

[319] See UTC Petition at 12. Section 15.303(b) states that a coordinatable PCS device is a PCS device whose geographical area of operation is sufficiently controlled either by necessity of operation with a fixed infrastructure or by disabling mechanisms to allow adequate coordination of its location relative to incumbent fixed microwave facilities. See Section 15.303(b) of the Commission's Rules.

[320] See UTAM Petition at 3-4.

[321] Cf. Section 15.307(c) of the Commission's Rules: "An application for certification of a PCS device that is deemed by UTAM, Inc., to be noncoordinatable will not be accepted until the Commission announces that a need for coordination no longer exists."

[322] Section 15.307(d) requires that a coordinatable PCS device include measures to assure that it cannot be activated until its installation at an authorized location is verified by UTAM. See Section 15.307(d) of the Commission's Rules.

[323] See Ericsson Petition at 15. See Section 15.307(d),(e) of the Commission's Rules.

213. AT&T, in its petition, maintains that the current requirement that the existing Part 15 test procedures be used where applicable, and supplemented by good engineering practice, does not provide sufficient guidance for industry.[324] AT&T requests that the Commission allow the ANSI C63 Committee to develop standard criteria for testing and measuring unlicensed devices.

214. Responses. AAR, Microsoft and Rolm support Apple's position regarding UTAM's role as the coordinator for unlicensed devices.[325] For example, Rolm believes we should establish measures to provide additional assurances that the interests of all nomadic device proponents, both voice and data, will be protected. Several other parties, including Motorola and Northern Telecom, support our designation of UTAM as the coordinator for unlicensed operations.[326] These parties point out that various UTAM members have an interest in marketing data and voice products. They also note that UTAM's membership is open to all and that UTAM has actively solicited participation from the data industry.

215. UTC opposes UTAM's request that the requirements regarding verification of the location of coordinatable devices be construed broadly to permit any method of verification, including the reports of licensed installers.[327] UTC argues that only technological means included in the design of the equipment can provide adequate insurance against unauthorized deployment or relocation. Apple also opposes UTAM's request, arguing that its efforts to broaden the range of allowable disabling techniques appear to be at odds with the Commission's intent to ensure against interference to incumbents.[328] AAR supports UTC's request for more specific labeling.[329] AAR also maintains that UTAM should be held responsible for verifying the installation or relocation of coordinatable devices at the coordinated locations.

216. Ericsson argues that AT&T's claims regarding problems associated with the testing of unlicensed PCS devices are exaggerated.[330] Northern Telecom also opposes AT&T's request, stating that the current rules are adequate to allow products to be developed

---

[324] See AT&T Petition at 2.

[325] See AAR Petition at 7; Microsoft Comments at 1; Rolm Reply at 2.

[326] See Motorola Reply at 2; Northern Telecom Comments at 17.

[327] See UTC Comments at 10.

[328] See Apple Comments at 6.

[329] See AAR Comments at 7-8.

[330] See Ericsson Comments at 13.

and deployed and that awaiting the development of new test procedures would significantly delay implementation.[331]

217. Decision. We continue to believe that our basic approach for regulation of unlicensed PCS devices is appropriate. Based on the record, we continue to find that UTAM is the most suitable entity to act as the coordinator for unlicensed PCS devices. We concur with those parties that indicate that UTAM is making good faith efforts to be open and to include the participation of all interested parties, including representatives of the data community. We do not believe that additional guidance or requirements are needed for UTAM at this time. With regard to Apple's specific request that we eliminate UTAM's designation in the rules, we see no merit in such an approach at this time. We will have ample opportunity to review our decision to designate UTAM as the coordinator for unlicensed devices during our review of its funding and band-clearing plans. If UTAM is found unacceptable as a result of our review process, we can amend our rules at that time to designate another entity.

218. With regard to Apple's request that we grant conditional equipment approvals for nomadic devices, it is our intention to consider such approvals at an appropriate future time. When spectrum is available, or soon will be available, for the operation of nomadic devices, we will issue a Public Notice announcing that we will begin accepting and processing applications for certification of nomadic devices. If we accept such applications before the spectrum is fully cleared for use by nomadic devices, the applications will be processed, but the actual grants withheld until an announcement is made that coordination is no longer required. At that time, the grants, if justified, will be immediately issued. We believe that this approach addresses Apple's principal concerns that manufacturers be able to quickly introduce new nomadic equipment.

219. We agree with UTC that the labels for coordinatable unlicensed PCS equipment should also indicate that any relocation of the device must also be coordinated through, and approved by, UTAM and should include a toll-free number to assist users in contacting UTAM. This additional information will not impose additional burden on equipment manufacturers and will improve compliance with the coordination requirements for unlicensed PCS devices. We do not agree with UTC that a more rigorous definition of a "coordinatable PCS device" is needed. We continue to believe that the current definition is adequate to protect existing microwave operations from interference. The current definition also provides equipment manufacturers flexibility in designing their equipment to avoid such interference.

220. We understand UTAM's position that the determination of whether and to what degree an unlicensed PCS device is coordinatable may place UTAM in a position of potential conflict of interest with its own members. Nevertheless, UTAM, as the coordinator for unlicensed device use, is responsible for ensuring that such devices do not cause interference

---

[331] See Northern Telecom Comments at 16.

to existing microwave operations. Accordingly, we believe it is entirely reasonable and prudent to require that UTAM make a finding with regard to the degree to which an unlicensed device can be coordinated and deployed. It is our intent that UTAM make such determinations in concert with the requirements of Section 15.307(b) of the rules.[332] In this regard, we also agree with UTAM that a broad interpretation of the rules for preventing interference by unlicensed devices, such as the requirement for verification that an unlicensed device is being used at an authorized location, is appropriate. This will afford UTAM latitude to develop its own policies and interpretations for the wide range of unlicensed devices that are expected to be developed. We therefore will allow UTAM broad flexibility in establishing the means it uses to fulfill its responsibility for ensuring that unlicensed devices to not interfere with existing microwave operations. Such means could include, where appropriate, the use of authorized installers to ensure that unlicensed devices do not cause interference.

221. Further, as part of our equipment authorization process, we will review closely the technical aspects of each unlicensed device. This review will include all technical matters related to the device's ability to be coordinated, as well as, other measures that may be imposed by UTAM on the operation of the device. This review will provide oversight to ensure that such measures developed by UTAM are sufficient to protect existing microwave from harmful interference.

222. We agree with Ericsson that some modification of the rules is appropriate to clarify the showings necessary to demonstrate compliance with the activation and disabling requirements of Section 15.307. Accordingly, we are amending the rules to indicate that each application for certification must contain an explanation of all measures for ensuring that the device cannot be activated until installation at its authorized location as verified by UTAM and for automatically disabling the device in the event that it is relocated outside the coordinated geographic area. Such showings shall include all procedural safeguards, such as the mandatory use of licensed technicians to install and relocate the equipment, and a complete description of all technical features controlling activation and disabling of the device. We believe that these showings, in addition with the findings required by UTAM, will be adequate to demonstrate that a device is coordinatable and can be used in a manner that will not cause interference.

223. We agree with Ericsson and Northern Telecom that the current test and measurement procedures are adequate and will allow authorization of equipment to commence without delay. We note that the ANSI C63 Committee has already begun work, in cooperation with WINForum, to develop specific procedures for unlicensed PCS equipment.

---

[332] Section 15.307(b) requires UTAM to submit an affidavit with each equipment application, certifying that the applicant is a participating member of UTAM. See Section 15.307(b) of the Commission's Rules.

We will address specific test and measurement procedures developed by recognized national standards bodies, such as ANSI C63, at such times as they are completed.

C. Spectrum Etiquette

224. In the Second Report and Order, the Commission adopted technical operating requirements for unlicensed PCS devices. These requirements were based largely on a spectrum "etiquette" developed on a consensus basis by an association of manufacturers and other interested parties known as the WINForum. The Commission made some minor modifications to the WINForum etiquette to take into account the allocation of additional spectrum for unlicensed PCS, to improve spectrum efficiency and to address specific comments and concerns. In particular, it divided the 40 MHz of spectrum for unlicensed devices into two equal 20 MHz allocations; one for isochronous transmissions at 1890-1900 MHz and 1920-1930 MHz and one for asynchronous transmissions at 1900-1920 MHz. The Commission adopted WINForum's 1.25 MHz channelization for the 1920-1930 MHz band, but provided for up to 5 MHz channels in the 1890-1900 MHz band. The asynchronous spectrum at 1900-1920 MHz was divided into two 10 MHz channels. Separate technical requirements were specified for each transmission method.[333]

225. Petitioner's Requests. Several parties request modifications to the technical rules governing unlicensed operations. These parties request changes to the channelization plans for the isochronous and asynchronous bands and raise a variety of other technical concerns regarding the unlicensed spectrum etiquette.

226. Motorola requests that we adopt the 1.25 MHz channelization plan for all isochronous spectrum.[334] Motorola asserts that 1.25 MHz channels will help to avoid interference between systems and ensure that no one system or technology monopolizes the spectrum at a given location. Ericsson, Rockwell and Lace request that we impose no channelization on the isochronous spectrum and instead develop a spectrum occupancy limit.[335] They argue that the existing channelization plan disadvantages wideband technologies. Ericsson and Rockwell suggest that we limit the spectrum occupancy for isochronous devices to no more than 50 percent of the available spectrum in each portion of the isochronous band. Lace suggests, as an alternative, limiting channel bandwidths to 2.5 MHz in the isochronous spectrum. Apple requests that we adopt uniform, flexible rules for channelization of all the isochronous spectrum, so as to be fair to all technologies, and requests that the 10 MHz channelization of the asynchronous spectrum be eliminated.[336] It

---

[333] See Sections 15.321, 15.323 of the Commission's Rules.

[334] See Motorola Petition at 11.

[335] See Ericsson Petition, Appendix I at 5; Rockwell Petition at 3; Lace Petition at 3.

[336] See Apple Petition at 7.

argues that this change would facilitate use of wideband signals and enable operation in the middle of the asynchronous spectrum to avoid adjacent channel interference.

227. AT&T, Northern Telecom, and WINForum state that the WINForum recommendations regarding the power limits were based on measurements of mean (average) power, rather than the peak power specified in the rules.[337] These parties argue that use of peak power measurements unfairly penalizes certain digital modulation techniques. They request that we base the power limit on mean power and impose a limit of 10 dB on the peak-to-average power ratio. PCIA and Rockwell request that the maximum 10 millisecond frame period for isochronous systems be increased from 10 to 20 milliseconds.[338]

228. Apple, Ericsson, Metricom, Rockwell, SpectraLink and WINForum request changes in the method by which devices are required to search for unused channels on which to operate.[339] This requirement specifies that searches for time/spectrum windows must begin at a particular band edge and search across the band until an unoccupied window is located.[340] Apple, Metricom and SpectraLink request that this requirement be deleted. Apple and SpectraLink argue that it increases the potential for adjacent channel interference between unlicensed devices and precludes the use of guard bands at the band edges. Ericsson and Rockwell request that the channel search rule be modified to permit spectrum searches to begin within a range of frequencies inside the band edge. They state that this revision will improve interoperability with the licensed service equipment. WINForum suggests that we remove the channel search rule for the isochronous spectrum. WINForum states that by mandating the same search algorithm for all unlicensed devices, the rule will increase the probability of two devices attempting to seize the open channel. Further, WINForum asserts that requiring all open channel searches to start at the same channel precludes the use of high efficiency multi-cell frequency reuse architectures because groups of channels can be allocated to specific cells. AT&T, Apple and Ericsson request that we modify the requirement for ± 3 dB accuracy and impose a ± 6 dB tolerance or one-sided 3 dB tolerance in measuring the

---

[337] See AT&T Petition, Attachment B at 6; Northern Telecom Petition at 23; WINForum Petition at 6. The rules currently specify that the peak transmit power of unlicensed PCS devices shall not exceed 100 microwatts multiplied by the square-root of the emission bandwidth in hertz. See Section 15.319(c)of the Commission's Rules.

[338] See PCIA Petition at 19, Rockwell Petition at 5. See Section 15.321(e) of the Commission's Rules.

[339] See Apple Petition at 5; Ericsson Petition at 2; Metricom Petition at 3, 5; Rockwell Petition at 7; SpectraLink Petition at 9.

[340] See Sections 15.321(b), 15.323(b) of the Commission's Rules.

power to determine whether a channel is occupied.[341] Motorola suggests we delete the requirement and simply prohibit devices from operating on a channel if the receive power of signals from other transmitters is a specific level above the noise floor.[342] They state that eliminating the accuracy requirement would provide equipment manufacturers additional freedom in system design without increasing interference.

229. AT&T, Ericsson and Motorola request changes in the etiquette with regard to acknowledgements of transmissions in an isochronous system in order to prevent monopolization of the spectrum.[343] The rules currently require that an acknowledgement from a system participant must be received by the initiating transmitter within one second or the transmission must cease.[344] AT&T suggests that we require a transmitter to repeat the channel access criteria whenever transmission temporarily ceases. Ericsson proposes requiring an acknowledgement every 10 seconds, and Motorola recommends every 30 seconds. AT&T, Northern Telecom, SpectraLink and Motorola also ask that we permit control and signaling information to be transmitted for 30 seconds without acknowledgement.[345] They argue that polling of a group of devices requires more than the one second currently allowed and that battery life considerations for portable devices warrant a longer time for these transmissions.

230. AT&T, Ericsson, Motorola, Northern Telecom and WINForum request that we amend the rules to specify use of the WINForum etiquette provisions for duplex operation.[346] The WINForum etiquette only requires one transmitter on a paired channel to search for an unused channel before initiating operation, while the current rules require both transmitters to perform a search.[347] These petitioners indicate that, because these devices will use fixed pairings, only one transmitter should be required to perform the search.

---

[341] See AT&T Petition, Attachment B at 14 and 18; Apple Petition at 7; Ericsson Petition at 12.

[342] See Sections 15.321(c)(6),(8) of the Commission's Rules.

[343] See AT&T Petition, Attachment B at 11; Ericsson Petition at 14; Motorola Petition at 14.

[344] See Section 15.319(c)(4) of the Commission's Rules.

[345] See AT&T Petition, Attachment B at 12; Northern Telecom Petition at 24; Motorola Petition at 14; SpectraLink Petition at 8.

[346] See AT&T Petition, Attachment B at 14; Ericsson Petition at 1; Motorola Petition at 15; Northern Telecom Petition at 25.

[347] See Sections 15.321(c), 15.323(c) of the Commission's Rules.

231. Northern Telecom requests that we adopt the WINForum provision for multicarrier shared antennas.[348] The rules currently require that an unlicensed device monitor the time and spectrum windows its transmission is intended to occupy.[349] Northern Telecom indicates that when multiple systems share the same antenna, transmissions on adjacent channels may be precluded under the monitoring technique specified in the rules. It states that this occurs because systems sharing the same antenna will detect spurious emissions of other systems that are transmitting and thus not use the adjacent channels. Northern states that the WINForum etiquette accommodates use of multiple systems sharing the same antenna by allowing the listen-before-talk operation to be performed in the intended receive time and spectrum window, rather than the transmit time and spectrum window. Northern Telecom contends that the WINForum approach would be equally effective in preventing interference as that specified in the current rules.

232. Ericsson and Northern Telecom state that the frequency stability requirement for variations in temperature should be modified.[350] They argue that the requirement should be relaxed to ±10 ppm at stabilized temperature extremes from +10° C to +40° C. Northern Telecom also requests that the voltage component of the frequency stability requirement be relaxed to ±10 percent of the primary voltage supply. Ericsson and WINForum request that we relax the limit for spurious emissions on first adjacent channels by 10 dB.[351] They argue that the current 40 dB attenuation requirement for these emissions is more stringent than is needed to control interference and increases equipment costs.[352]

233. Metricom proposes in their petition that we conform the etiquette with the spread spectrum provisions currently in Part 15 for equipment operating in the ISM bands.[353] In their May 25, 1994 ex parte filing, their proposal was modified to request only a power increase to one watt, a requirement for automatic power control, and permission to use a 200 kHz

---

[348] See Northern Telecom Petition at 24.

[349] See Sections 15.321(c), 15.323(c) of the Commission's Rules.

[350] See Ericsson Petition at 3; Northern Telecom Petition at 26. The rules require that the frequency stability of the carrier frequency of unlicensed PCS devices be maintained within ±10 parts-per-million (ppm) over a temperature variation of -30° C to +50° C, and power supply voltage variations of ±15 percent. See Sections 15.321(f), 15.323(f) of the Commission's Rules.

[351] See Ericsson Petition at 8; WINForum Petition at 5.

[352] The rules currently require that emissions between the channel edges and 1.25 MHz above or below the channel be attenuated 40 dB below the reference power level of 112 milliwatts. See Sections 15.321(d) and 15.323(d) of the Commission's Rules.

[353] See Metricom Petition at 3, Section 15.247 of the Commission's Rules.

bandwidth.[354] Metricom argues that this would promote a more competitive and cost effective data PCS service.

234. Responses to Petitions. In their response, WINForum and Northern Telecom support Motorola's request that we specify 1.25 MHz channelization for all the isochronous spectrum.[355] On the other hand, Omnipoint and Rolm support the elimination of all channelization of the isochronous spectrum.[356] They state that the 1.25 MHz channelization will impede certain wideband technologies. Ericsson opposes changes to the peak power measurement requirement, and claims that permitting a 10 dB peak-to-average ratio will cause increased interference between unlicensed devices.[357] Motorola, Northern Telecom and SpectraLink oppose lengthening the frame period.[358] They contend that such a change would necessitate longer call setup time.

235. Rolm supports deletion of the channel search requirements.[359] Omnipoint supports the modification of these rules to allow spectrum searches to begin on a range of frequencies as requested by Ericsson and Rockwell.[360] Ericsson, SpectraLink, and Omnipoint oppose Northern Telecom's request to reinstate the WINForum provision that allows monitoring of receive channels for multicarrier shared antennas.[361] They claim that this provision undercuts the purpose of the listen-before-talk provisions of the etiquette, and therefore will degrade the ability of systems to share the spectrum. Motorola opposes relaxation of the requirement for attenuation of emissions on first adjacent channels.[362] It argues that because of measurement differences, the current 40 dB attenuation requirement for first adjacent channels is close to the WINForum proposal for this standard.

---

[354] See Metricom Ex parte presentation (May 25, 1994).

[355] See WINForum Comments at 3; Northern Telecom Comments at 12.

[356] See Omnipoint Comments at 7; Rolm Comments at 1.

[357] See Ericsson Comments at 8.

[358] See Motorola Reply at 7; Northern Telecom Comments at 14; SpectraLink Comments at 2.

[359] See Rolm Comments at 2.

[360] See Omnipoint Comments at 9.

[361] See Ericsson Comments at 12; SpectraLink Comments at 3; Omnipoint Comments at 11.

[362] See Motorola Reply at 4.

236. Decisions. Our initial decision provided spectrum for both wideband and narrowband isochronous applications. We are now, however, reducing the spectrum available for isochronous devices from 20 MHz to 10 MHz. With this reduction, it is important that the remaining spectrum be used as efficiently as possible. In this regard, we agree with Motorola, Northern Telecom and others that a 1.25 MHz channelization plan will foster more efficient spectrum utilization. As indicated by those parties, such a plan will more readily prevent a single user or system from monopolizing the spectrum at a given location. We find that a plan that provides wider channels or no channelization at all could result in inefficient use of the spectrum and preclude other parties from using the spectrum. Further, we do not believe a spectrum occupancy limit, as suggested by some parties, would be practical or enforceable. We believe that a 1.25 MHz channel plan will simplify equipment design and permit better management of spectrum use. Accordingly, we are adopting such a channelization plan for the 10 MHz of isochronous spectrum. If in the future we are presented with information that shows that wider channels can be accommodated without compromising spectrum efficiency or monopolizing the spectrum (i.e., through use of reduced power levels for wideband systems, or establishing a spectrum efficiency standard, etc.), we may revisit this matter.

237. With regard to the asynchronous band, we note that channelization is not as critical for such transmissions, since asynchronous transmissions will be of very short duration and not occupy the spectrum continuously. Accordingly, we are eliminating the channelization requirements for the asynchronous spectrum.

238. We do not agree with WINForum and others that the power specification should be based on mean rather than peak power. Given that a wide variety of modulation methods will be permitted, measurement of mean power could become complex and subject to differing interpretations. This could lead to equipment design uncertainties and potential delays and complications in equipment authorization. We find that measurement of peak power is straightforward and will not unduly penalize any technology. We therefore are not altering the method specified in the rules for measuring the output power of unlicensed PCS devices. With regard to PCIA, Rockwell and Omnipoint's request to increase the frame period, we believe that a longer frame period could potentially reduce spectrum efficiency. We are also unconvinced that an increase in the frame period would improve the likelihood of compatibility with future technical standards for licensed PCS equipment. Therefore, we are not modifying the rules in this regard.

239. With regard to the channel search requirements, we are amending the rules to permit a device to begin its search for an unused channel at any point within a range of frequencies from a band edge, as requested by the several petitioners. This will permit manufacturers greater flexibility to use guard bands, if needed, while retaining most of the spectrum efficiency advantages gained by orderly selection of channels. We disagree with WINForum and others that the channel search rule significantly increases the potential for two devices attempting to seize the same channel at the same instant in time. Nor do we believe this requirement impedes the use of coordinated multi-cell systems. We also agree with the

petitioners that the existing requirement for accuracy in monitoring signal levels should be deleted. We find that the existing monitoring threshold requirements are sufficient to ensure that unlicensed devices do not interfere with one another.

240. We agree with the petitioners that a requirement for periodic acknowledgement of transmissions is necessary to ensure that a device does not monopolize the spectrum. Therefore, we are modifying the etiquette to require an transmitter to receive an acknowledgement of transmissions from a system participant every 30 seconds and to cease transmission if such acknowledgement is not received. We also will permit control and signaling information to be transmitted for 30 seconds without acknowledgement, as requested by several parties.

241. With regard to duplex operation, we are persuaded that some changes are appropriate. While we recognize that performing the listen-before-talk operation at only one transmitter location may increase the potential for interference, we believe that this increase is low and is outweighed by the benefits of simpler, more cost effective equipment design. Therefore, we are incorporating WINForum's provisions for paired duplex channel operation into the rules. We are also persuaded that an exception to the listen-before-talk provisions is appropriate for systems that employ multicarrier shared antennas. Northern Telecom's proposal to monitor the receive channel rather than the transmit channel should not significantly increase the risk of causing interference to other unlicensed PCS spectrum users and we are amending the rules to allow this approach.

242. We agree with Ericsson and Northern Telecom that the frequency stability requirements for unlicensed PCS devices should be relaxed. We believe that unlicensed PCS devices will generally operate under the same the range of temperature and voltage conditions specified for other Part 15 devices.[363] Accordingly, we are requiring that the operating frequency of unlicensed PCS devices be maintained within $\pm$10 ppm over a temperature range of -20° C to +50° C at normal supply voltage and for variation in the primary voltage of $\pm$15 percent at 20° C. While we note that the stability requirement $\pm$10 ppm is more strict than for other Part 15 devices, we believe this is necessary to ensure the proper function of the etiquette. We are also relaxing from 40 dB to 30 dB the limit for suppression of spurious emissions in the first adjacent channels as requested by Ericsson and WINForum. This will reduce equipment costs while still providing adequate interference protection between unlicensed PCS systems.

---

[363] The Part 15 rules require that the operating frequency of certain unlicensed devices be maintained within ±0.01 percent (or 100 ppm) of the device's operating frequency over a temperature range of -20° C to +50° C at normal supply voltage, and for variation in the primary voltage of ±15 percent at a temperature of +20° C. See e.g., Sections 15.231, 15.233 of the Commission's Rules.

243. We note that Metricom's request to conform the etiquette to match the Part 15 standards for spread spectrum devices was not addressed by other commenters in the proceeding. Further, we observe that Metricom's clarification of its petition was made well after the comment periods had closed and so other parties had little opportunity to respond. We find that Metricom's proposal is inconsistent with the sharing and spectrum efficiency goals that underlie the unlicensed PCS etiquette described by WINForum. We find that WINForum considered factors such as power levels, bandwidth and dynamic power reduction and arrived at appropriate recommendations. Their proposal runs counter to precepts which form the basis of the spectrum etiquette that received broad industry support. Accordingly, we are rejecting Metricom's request.

244. Many of the petitioners and responding parties suggest edits in the etiquette language to improve clarity and understanding of the etiquette concepts. Examples of these changes include: clarifying that the period of time to be monitored is the time period immediately prior to initiating a transmission; specifying the starting time for calculating compliance with the monitoring period before reaccessing the same channel for isochronous equipment; and, clarifying that the range of the monitoring period for asynchronous devices must be doubled progressively for each unsuccessful channel access. To the extent that clarifications of various provisions of the etiquette were deemed necessary, they have been incorporated in the amended rules.

VIII. RADIO FREQUENCY EXPOSURE LIMITS

245. In the Second Report and Order, the Commission required PCS licensees and equipment to comply with the standards set forth in ANSI/IEEE C95.1-1992, "Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz" (ANSI/IEEE guidelines).[364] The Commission stated that for purposes of determining compliance with these standards, all handheld PCS equipment will be considered to operate in an "uncontrolled" environment. It also noted that the exclusions for low power devices contained in the ANSI/IEEE guidelines only apply to transmitters operating at 1500 MHz and below. Therefore, the Commission indicated that, pending an interpretation from the IEEE,

---

[364] The Commission stated that these standards will apply to PCS operations pending completion of its complete review of standards for RF exposure. See Notice of Proposed Rule Making, ET Docket No. 93-62, 8 FCC Rcd 2849 (1993). The Commission further indicated that any RF exposure standards adopted in the instant proceeding that do not conform with the final rules adopted later in ET Docket No. 93-62 will be modified as appropriate.

PCS equipment must demonstrate compliance with the ANSI/IEEE guidelines for maximum specific absorption rates (SAR).[365]

246. Petitioners' Requests. In its petition, PCIA requests that we clarify the rules governing RF exposure from PCS equipment. It notes that the text of the Second Report and Order indicates that handheld PCS devices must comply with the standards for uncontrolled environments, while Section 24.52 of the rules provides that all PCS equipment (which would include base stations as well as handheld units) will be considered to operate in an uncontrolled environment. PCIA submits that the rules should allow use of the less stringent "controlled" environment standards for base stations where appropriate.

247. Responses. APC agrees with PCIA that the rules should allow use of the standards for controlled environments for base stations. MCI also supports this request and states that the request to increase the base station power limit would not result in additional risk of harmful exposure to RF radiation. Northern Telecom, in reply comments, submits that, as an interim measure, manufacturers should be allowed to the extrapolate the ANSI/IEEE formula up to the 2 GHz band to determine whether their equipment meets the exclusions for low power devices. It states that due to a lack of testing facilities, a requirement for SAR testing would delay PCS implementation.

248. Decision. We agree with PCIA that the guidelines for RF exposure from PCS base stations should apply according to the type of environment in which the exposure takes place. We also concur with PCIA and others that there is no need to employ the uncontrolled exposure limits in those areas in the vicinity of a PCS base station where there is restricted access by the general public and exposure to the RF field is unlikely. Accordingly, we are amending the rules to include both the uncontrolled and controlled limits for PCS base stations. The definitions of "controlled" and "uncontrolled" environments specified in ANSI/IEEE C95.1-1992 will govern which limits will apply.[366]

249. As noted above, we requested a formal interpretation from the IEEE as to whether the formula for determining the threshold level for the exclusion from the RF exposure standards can be extrapolated to the 2 GHz range. The IEEE radiated power exclusion applies when a 2.5 cm separation distance is maintained between the body and the

---

[365] The Commission also indicated that it had requested a formal interpretation from the IEEE as to whether the formula for determining the power threshold for the exclusion from the standards can be extrapolated up to 2200 MHz. See Letter from Thomas P. Stanley to Andrew G. Salem, IEEE Standards Board (June 2, 1993). This provision exempts a device from the SAR testing requirements, if the device operates with power output below a certain threshold level. Extrapolating the formula for this threshold up to 2200 MHz would allow PCS transmitters to operate with about 330 milliwatts of power.

[366] See ANSI/IEEE C95.1-1992, Section 2 (Definitions and Glossary of Terms).

radiating structure. In its response to our request, IEEE stated that, while it cannot predict whether such an extension of the standard would be incorporated into the next revision of C95.1, extrapolation of the current formula to frequencies up to 2.2 GHz would be conservative.[367] We therefore are amending the rules to apply the ANSI/IEEE radiated power exclusions for low power devices to PCS devices. In implementing this change, however, we find that it is appropriate to provide an additional margin to ensure that devices approved for operation under the exclusion will comply with any changes to the RF exposure guidelines that may be adopted in the future. Accordingly, we will exclude PCS devices that operate with output power of 100 milliwatts or less from the SAR testing requirements. PCS devices operating at higher powers must be subjected to SAR testing to determine compliance with the RF exposure guidelines.[368]

IX. CONCLUSION

250. We are amending our rules as described above to ensure that the American public benefits from new mobile digital voice and data services. We believe that our rules, as amended, will foster rapid development of a competitive market that will provide consumers with access to a diverse array of high-quality, low-cost PCS services and products on a wide-area basis. With adoption of these amendments, our rules are finalized and we now intend to proceed expeditiously to license broadband PCS services through the competitive bidding process.

---

[367] See Letter to Thomas P. Stanley from Eleanor R. Adair, Co-Chairman, SC-4, Standards Coordinating Committee 28, IEEE (October 11, 1993).

[368] The methodology for SAR testing is described in numerous technical publications. See e.g., IEEE Recommended Practice for the Measurement of Potentially Hazardous Electromagnetic Fields - RF and Microwave, IEEE C95.3-1991, at §§ 4.6, 4.7 and Appendix C. See also reference list in same publication. Copies of this document can be purchased from the IEEE, at telephone number (800) 678-IEEE. A copy may also be inspected at the FCC's Office of Engineering and Technology, Spectrum Engineering Division, (202) 653-8169.

X. PROCEDURAL INFORMATION

251. Regulatory Flexibility Analysis. The analysis required by the Regulatory Flexibility Act of 1980, 5 U.S.C. Section 608, is contained in Appendix C.

252. Ordering Clause. Accordingly, IT IS ORDERED, That Parts 2, 15, and 24 of the Commission's Rules ARE AMENDED as specified in Appendix A, effective 30 days after publication in the Federal Register; except that amendments to Sections 15.311 and 24.204(f)(1), (2), (3)(i), (3)(ii) are effective 90 days after publication in the Federal Register. This action is taken pursuant to Sections 4(i), 7(a), 302, 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 302, 303(c), 303(f), 303(g), and 303(r). Furthermore, IT IS ORDERED, That the petitions for reconsideration ARE GRANTED, to the extent described above and DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix A: Final Rules

I. Part 2 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 2 -- FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation for Part 2 is revised to read as follows:

AUTHORITY: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303 and 307, unless otherwise noted.

2. Subpart B is amended by revising Section 2.106, the Table of Frequency Allocations, as follows:

a. In the 1850-1990 MHz band: delete NG153 from column 5; and in column 6 replace PERSONAL COMMUNICATIONS SERVICES (99) with PERSONAL COMMUNICATIONS SERVICES (24). In the 2110-2150 and 2160-2200 MHz bands: delete US331 from column 5; and in column 6 delete PERSONAL COMMUNICATIONS SERVICES (99).

* * * * * * *

International table			United States table		FCC use designators	
Region 1-allocation MHz	Region 2-allocation MHz	Region 3-allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule part(s)	Special-use frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1710-1930	FIXED. MOBILE 740A. 722 744 745 746 746A		* * * * *			
1930-1970 FIXED. MOBILE. 746A	1930-1970 FIXED. MOBILE. Mobile-Satellite (Earth-to-space). 746A	1930-1970 FIXED. MOBILE. 746A	1850-1990 FIXED. MOBILE. US331	1850-1990 FIXED. MOBILE.	PERSONAL COMMUNICATIONS SERVICES (24). PRIVATE OPERATIONAL-FIXED MICROWAVE (94). RADIO FREQUENCY DEVICES (15).	EMERGING TECHNOLOGIES
1970-1980 FIXED. MOBILE. 746A	1970-1980 FIXED. MOBILE. MOBILE-SATELLITE (Earth-to-space). 746A 746B 746C	1970-1980 FIXED. MOBILE. 746A				
1980-2010	FIXED. MOBILE. MOBILE-SATELLITE (Earth-to-space). 746A 746B 746C		1990-2110 US90 US111 US219 US222	1990-2110 FIXED. MOBILE. US90 US111 US219 US222 NG23 NG118	AUXILIARY BROADCAST (74). CABLE TELEVISION (78).	
2010-2025	FIXED. MOBILE. 746A					
2025-2110	FIXED. MOBILE 747A. SPACE RESEARCH (Earth-to-space) (space-to-space). SPACE OPERATION (Earth-to-space) (space-to-space). EARTH EXPLORATION-SATELLITE (Earth-to-space) (space-to-space). 750A					

International table			United States table		FCC use designators	
Region 1-allocation MHz	Region 2-allocation MHz	Region 3-allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule part(s)	Special-use frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
2110-2120	FIXED. MOBILE. SPACE RESEARCH (deep space)(Earth-to-space). 746A		2110-2200	2110-2150 FIXED. MOBILE.	DOMESTIC PUBLIC FIXED (21). PRIVATE OPERATIONAL-FIXED MICROWAVE (94). PUBLIC MOBILE (22).	EMERGING TECHNOLOGIES
2120-2160 FIXED. MOBILE.	2120-2160 FIXED. MOBILE. Mobile-Satellite (space-to-Earth).	2120-2160 FIXED. MOBILE.		US111 US252 NG23 NG153		
				2150-2160 FIXED.	MULTIPOINT DISTRIBUTION (21). PRIVATE OPERATIONAL-FIXED MICROWAVE (94).	
746A	746A	746A		NG23		
2160-2170 FIXED. MOBILE.	2160-2170 FIXED. MOBILE. MOBILE-SATELLITE (space-to-Earth).	2160-2170 FIXED. MOBILE.		2160-2200 FIXED. MOBILE.	DOMESTIC PUBLIC FIXED (21). PRIVATE OPERATIONAL-FIXED MICROWAVE (94). PUBLIC MOBILE (22).	EMERGING TECHNOLOGIES
746A	746A 746B 746C	746A				
2170-2200	FIXED. MOBILE. MOBILE-SATELLITE (space-to-Earth). 746A 746B 746C		US111 US252 US331	NG23 NG153		

* * * * * * *

b. The text of footnote US331 in the United States footnotes and footnote NG153 in the Non-Government footnotes is revised to read as follows:

UNITED STATES (US) FOOTNOTES

* * * * *

US331 In the frequency band 1850-1990 MHz, the only fixed PCS services permitted are ancillary services used in support of mobile personal communications services.

* * * * *

NON-GOVERNMENT (NG) FOOTNOTES

* * * * *

NG153 The 2110-2150 MHz and 2160-2200 MHz bands are reserved for future emerging technologies on a co-primary basis with the fixed and mobile services. Allocations to specific services will be made in future proceedings.

* * * * *

II. Part 15 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 15 -- RADIO FREQUENCY DEVICES

1. The authority citation continues to read as follows:

AUTHORITY: Sec. 4, 302, 303, 304, and 307 of the Communications Act of l934, as amended, 47 U.S.C. Sections 154, 302, 303, 304, and 307.

2. The Table of Contents of Part 15, Subpart D, is revised to read as follows:

* * * * *

Subpart D -- Unlicensed Personal Communications Services Devices

* * * * *

15.321 Specific requirements for asynchronous devices operating in the 1910-1920 MHz sub-band.

15.323 Specific requirements for isochronous devices operating in the 1920-1930 MHz sub-band.

* * * * *

3. Section 15.301 is revised to read as follows:

§ 15.301 Scope.

This subpart sets out the regulations for unlicensed personal communications services (PCS) devices operating in the 1910-1930 MHz frequency band.

4. Sections 15.303(g) and (j) are revised to read as follows:

§ 15.303 Definitions.

* * * * *

(g) *Personal Communications Services (PCS) Devices [Unlicensed].* Intentional radiators operating in the frequency band 1910-1930 MHz that provide a wide array of mobile and ancillary fixed communication services to individuals and businesses.

* * * * *

(j) *Thermal noise power.* The noise power in watts defined by the formula N=kTB where N is the noise power in watts, k is Boltzmann's constant, T is the absolute temperature in degrees Kelvin (e.g., 295° K) and B is the emission bandwidth of the device in hertz.

* * * * *

5. Sections 15.307(a),(d), and (e) are revised and new subparagraphs (a)(1) and (2) are added as follows:

§ 15.307 Coordination with fixed microwave service.

(a) UTAM, Inc., is designated to coordinate and manage the transition of the 1910-1930 MHz band from Private Operational-Fixed Microwave Service (OFS) operating under Part 94 of this Chapter to unlicensed PCS operations, conditioned upon submittal to and acceptance by the Commission of:

(1) A funding plan that is equitable to all prospective manufacturers of unlicensed PCS devices; and

(2) A plan for "band clearing" that will permit the implementation of noncoordinatable (nomadic) devices and, in particular, noncoordinatable data PCS devices, as promptly as possible. The responsibilities of UTAM, Inc. include, but are not limited to, relocation of existing OFS microwave stations pursuant to requirements established in ET Docket No. 92-9, negotiating costs of relocation, ensuring that comparable facilities are provided, and resolving any disputes of interference to OFS microwave operations from unlicensed PCS operations. These responsibilities shall terminate upon a determination by the Commission that interference to OFS microwave operations from unlicensed PCS operations is no longer a concern.

* * * * *

(d) A coordinatable PCS device is required to incorporate means that ensure that it cannot be activated until its location has been coordinated by UTAM, Inc. The application for certification shall contain an explanation of all measures taken to prevent unauthorized operation. This explanation shall include all procedural safeguards, such as the mandatory use of licensed technicians to install the equipment, and a complete description of all technical features controlling activation of the device.

(e) A coordinatable PCS device shall incorporate an automatic mechanism for disabling operation in the event it is moved outside the geographic area where its operation has been coordinated by UTAM, Inc. The application for certification shall contain a full description of the safeguards against unauthorized relocation and must satisfy the Commission that the safeguards cannot be easily defeated.

* * * * *

6. Section 15.311 is revised to read as follows:

§ 15.311 Labelling requirements.

In addition to the labelling requirements of Section 15.19(a)(3), all devices authorized under this subpart must bear a prominently located label with the following statement:

> Installation of this equipment is subject to notification and coordination with UTAM, Inc. Any relocation of this equipment must be coordinated through, and approved by UTAM. UTAM may be contacted at [insert UTAM's toll-free number].

7. Paragraphs (a) and (i) of Section 15.319 are revised to read as follows:

§ 15.319 General technical requirements.

(a) The 1910-1920 MHz sub-band is limited to use by asynchronous devices under the requirements of Section 15.321. The 1920-1930 MHz sub-band is limited to use by isochronous devices under the requirements of Section 15.323.

* * * * *

(i) The device must comply with IEEE C95.1-1991 (ANSI/IEEE C95.1-1992), "Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz." Measurement methods are specified in IEEE C95.3-1991, "Recommended Practice for the Measurement of Potentially Hazardous Electromagnetic Fields - RF and Microwave." Copies of these standards are available form the IEEE Standards Board, 445 Hoes Lane, P.O. Box 1331, Piscataway, NJ 08855-1331, telephone 1-800-678-4333. All equipment shall be considered to operate in an "uncontrolled" environment. The application for certification must contain a statement confirming compliance with IEEE C95.1-1991. Technical information showing the basis for this statement must be submitted to the Commission upon request. PCS hand-held devices whose radiated power is 100 milliwatts or less are excluded from SAR testing requirements as long as a 2.5 cm separation is maintained between the radiating structure and the body of the user. The ANSI/IEEE standard uses the term "radiated power" as meaning the input power to the antenna.

* * * * *

8. Section 15.323 is redesignated as Section 15.321. In the new Section 15.321, paragraphs (a),(b),(c)(1), (c)(4), (c)(6), (d), and (e) are revised to read as follows and paragraph (g) is deleted:

§ 15.321 Specific requirements for asynchronous devices operating in the 1910-1920 MHz sub-band.

(a) Operation shall be contained within the 1910-1920 MHz sub-band. The emission bandwidth of any intentional radiator operating in this sub-band shall be no less than 500 kHz.

(b) All systems of less than 2.5 MHz emission bandwidth shall start searching for an available spectrum window within 3 MHz of the sub-band edge at either 1910 or 1920 MHz, while systems of more than 2.5 MHz emission bandwidth will first occupy the center half of the sub-band. Devices with an emission bandwidth of less than 1.0 MHz may not occupy the center half of the sub-band if other spectrum is available.

(c) * * *

(1) Immediately prior to initiating a transmission, devices must monitor the spectrum window they intend to use for at least 50 microseconds.

* * * * *

(4) After completion of a transmission, an individual device or cooperating group of devices must cease transmission and wait a deference time randomly chosen from a uniform random distribution ranging from 50 to 750 microseconds, after which time an attempt to access the band again may be initiated. For each occasion that an access attempt fails after the initial inter-burst interval, the range of the deference time chosen shall double until an upper limit of 12 milliseconds is reached. The deference time remains at the upper limit of 12 milliseconds until an access attempt is successful. The deference time is re-initialized after each successful access attempt.

* * * * *

(6) The monitoring system shall use the same antenna used for transmission, or an antenna that yields equivalent reception at that location.

* * * * *

(d) Emissions shall be attenuated below a reference power of 112 milliwatts as follows: 30 dB between the sub-band edges and 1.25 MHz above or below the sub-band; 50 dB between 1.25 and 2.5 MHz above or below the sub-band; and 60 dB at 2.5 MHz or greater above or below the sub-band. Compliance with the emissions limits is based on the use of measurement instrumentation employing a peak detector function with an instrument resolution bandwidth approximately equal to 1.0 percent of the emission bandwidth of the device under measurement.

(e) The frequency stability of the carrier frequency of intentional radiators operating in this sub-band shall be ±10 ppm over 10 milliseconds or the interval between channel access monitoring, whichever is shorter. The frequency stability shall be maintained over a temperature variation of -20° to +50° Celsius at normal supply voltage, and over a variation in the primary supply voltage of 85 percent to 115 percent of the rated supply voltage at a temperature of 20 degrees Celsius. For equipment that is capable of operating only from a battery, the frequency stability tests shall be performed using a new battery without any further requirement to vary supply voltage.

9. Section 15.321 is redesignated as Section 15.323. In the new Section 15.323, paragraphs (a), (b), (c)(1), (c)(4), (c)(5), (c)(6), (c)(8), (d), and (f) are revised; the last sentence of paragraph (e) is revised; and new paragraphs (c)(10), (c)(11), and (c)(12) are added to read as follows:

§ 15.323 Specific requirements for isochronous devices operating in the 1920-1930 MHz sub-band.

(a) Operation shall be contained within one of eight 1.25 MHz channels starting with 1920-1921.25 MHz and ending with 1928.75-1930 MHz. Further sub-division of a 1.25 MHz channel is permitted with a reduced power level, as specified in Section 15.319(c), but in no event shall the emission bandwidth be less than 50 kHz.

(b) Intentional radiators with an intended emission bandwidth less than 625 kHz shall start searching for an available time and spectrum window within 3 MHz of the sub-band edge at 1920 MHz and search upward from that point. Devices with an intended emission bandwidth greater than 625 kHz shall start searching for an available time and spectrum window within 3 MHz of the sub-band edge at 1930 MHz and search downward from that point.

(c) * * *

(1) Immediately prior to initiating transmission, devices must monitor the combined time and spectrum windows in which they intend to transmit for a period of at least 10 milliseconds to determine if the access criteria are met.

* * * * *

(4) Once access to specific combined time and spectrum windows is obtained an acknowledgement from a system participant must be received by the initiating transmitter within one second or transmission must cease. Periodic acknowledgements must be received at least every 30 seconds or transmission must cease. Channels used exclusively for control and signalling information may transmit continuously for 30 seconds without receiving an acknowledgement, at which time the access criteria must be repeated.

(5) If access to spectrum is not available as determined by the above, and a minimum of 40 duplex system access channels are defined for the system, the time and spectrum windows with the lowest power level below a monitoring threshold of 50 dB above the thermal noise power determined for the emission bandwidth may be accessed. A device utilizing the provisions of this paragraph must have monitored all access channels defined for its system within the last 10 seconds and must verify within the 20 milliseconds immediately preceding

actual channel access that the detected power of the selected time and spectrum windows is no higher than the previously detected value. The power measurement resolution for this comparison must be accurate to within 6 dB. No device or group of cooperating devices located within 1 meter of each other shall occupy more than three 1.25 MHz channels. Devices in an operational state that are utilizing the provision of this section are not required to use the search provisions of (b) above.

(6) If the selected combined time and spectrum windows are unavailable, the device may either monitor and select different windows or seek to use the same windows after waiting an amount of time, randomly chosen from a uniform random distribution between 10 and 150 milliseconds, commencing when the channel becomes available.

* * * * *

(8) The monitoring system shall use the same antenna used for transmission, or an antenna that yields equivalent reception at that location.

* * * * *

(10) An initiating device may attempt to establish a duplex connection by monitoring both its intended transmit and receive time and spectrum windows. If both the intended transmit and receive time and spectrum windows meet the access criteria, then the initiating device can initiate a transmission in the intended transmit time and spectrum window. If the power detected by the responding device can be decoded as a duplex connection signal from the initiating device, then the responding device may immediately begin transmitting on the receive time and spectrum window monitored by the initiating device.

(11) An initiating device that is prevented from monitoring during its intended transmit window due to monitoring system blocking from the transmissions of a co-located (within one meter) transmitter of the same system, may monitor the portions of the time and spectrum windows in which they intend to receive over a period of at least 10 milliseconds. The monitored time and spectrum window must total at least 50 percent of the 10 millisecond frame interval and the monitored spectrum must be within the 1.25 MHz frequency channel(s) already occupied by that device or co-located co-operating devices. If the access criteria is met for the intended receive time and spectrum window under the above conditions, then transmission in the intended transmit window by the initiating device may commence.

(12) The provisions of (c)(10) or (c)(11) shall not be used to extend the range of spectrum occupied over space or time for the purpose of denying fair access to spectrum to other devices.

(d) Emissions shall be attenuated below a reference power of 112 milliwatts as follows: 30 dB between the channel edges and 1.25 MHz above or below the channel; 50 dB between 1.25 and 2.5 MHz above or below the channel; and 60 dB at 2.5 MHz or greater above or below the channel. Systems that further sub-divide a 1.25 MHz channel into X sub-channels must comply with the following emission mask: In the bands between 1B and 2B measured from the center of the emission bandwidth the total power emitted by the device shall be at least 30 dB below the transmit power permitted for that device; in the bands between 2B and 3B measured from the center of the emission bandwidth the total power emitted by an

intentional radiator shall be at least 50 dB below the transmit power permitted for that radiator; in the bands between 3B and the 1.25 MHz channel edge the total power emitted by an intentional radiator in the measurement bandwidth shall be at least 60 dB below the transmit power permitted for that radiator. "B" is defined as the emission bandwidth of the device in hertz. Compliance with the emission limits is based on the use of measurement instrumentation employing a peak detector function with an instrument resolution bandwidth approximately equal to 1.0 percent of the emission bandwidth of the device under measurement.

(e) * * * Transmission shall be continuous in every time and spectrum window during the frame period defined for the device.

(f) The frequency stability of the carrier frequency of the intentional radiator shall be maintained within ±10 ppm over 1 hour or the interval between channel access monitoring, whichever is shorter. The frequency stability shall be maintained over a temperature variation of -20° to +50° degrees C at normal supply voltage, and over a variation in the primary supply voltage of 85 percent to 115 percent of the rated supply voltage at a temperature of 20° C. For equipment that is capable only of operating from a battery, the frequency stability tests shall be performed using a new battery without any further requirement to vary supply voltage.

III. Part 24 of Chapter I of Title 47 of the code of Federal Regulations is amended as follows:

PART 24--PERSONAL COMMUNICATIONS SERVICES

1. The authority citation for Part 24 continues to read as follows:

AUTHORITY: Secs. 4, 301, 302, 303, and 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. Sections 154, 301, 302, 303, and 332, unless otherwise noted.

2. In Section 24.1, paragraph (b) is revised to read as follows:

§ 24.1 Basis and purpose.

* * * * *

(b) Purpose. This part states the conditions under which portions of the radio spectrum are made available and licensed for PCS.

* * * * *

3. Section 24.3 is revised to read as follows:

§ 24.3 Permissible communications.

PCS licensees may provide any mobile communications service on their assigned spectrum. Fixed services may be provided only if ancillary to mobile operations. Broadcasting as defined in the Communications Act is prohibited.

4. Section 24.10 is revised to read as follows:

§ 24.10 Scope.

This subpart contains some of the procedures and requirements for filing applications for licenses in the personal communications services. One also should consult Subparts F and G of this part. Other Commission rule parts of importance that may be referred to with respect to licensing and operation of radio services governed under this part include 47 C.F.R. Parts 0, 1, 2, 5, 15, 17 and 20.

5. Section 24.11 is revised to read as follows:

§ 24.11 Initial authorization.

(a) An applicant must file an application for an initial authorization in each market and frequency block desired.

(b) Blanket licenses are granted for each market and frequency block. Applications for individual sites are not required and will not be accepted.

6. Section 24.52 is revised to read as follows:

§ 24.52 RF hazards.

(a) Licensees and manufacturers are required to ensure that their facilities and equipment comply with IEEE C95.1-1991 (ANSI/IEEE C95.1-1992), "Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz." Measurement methods are specified in IEEE C95.3-1991, "Recommended Practice for the Measurement of Potentially Hazardous Electromagnetic Fields - RF and Microwave." Copies of these standards are available from IEEE Standards Board, 445 Hoes Lane, P.O. Box 1331, Piscataway, NJ 08855-1331. Telephone: 1-800-678-4333. The limits for both "controlled" and "uncontrolled" environments, as defined by IEEE C95.1-1991, will apply to all PCS base and mobile stations, as appropriate. The application for equipment authorization must contain a statement confirming compliance with IEEE C95.1-1991. Technical information showing the basis for this statement must be submitted to the Commission upon request.

(b) PCS hand-held devices whose maximum radiated power is 100 milliwatts or less are not required to be evaluated for compliance with ANSI/IEEE SAR (specific absorption rate) requirements, as long as a 2.5 cm separation distance is maintained between the radiating structure and the body of the user. (The ANSI/IEEE standard uses the term "radiated power," meaning input power to the antenna.)

(c) For further information on the Commission's environmental rules see Section 1.1301 et seq.

7. Subpart E is revised to read as follows:

Subpart E--Broadband PCS

§ 24.200 Scope.

This subpart sets out the regulations governing the licensing and operations of personal communications services authorized in the 1850-1910 and 1930-1990 MHz bands.

§ 24.202 Service areas.

Broadband PCS service areas are Major Trading Areas (MTAs) and Basic Trading Areas (BTAs) as defined below. MTAs and BTAs are based on the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, at pages 38-39 ("BTA/MTA Map"). Rand McNally organizes the 50 states and the District of Columbia into 47 MTAs and 487 BTAs. The BTA/MTA Map is available for public inspection as the Office of Engineering and Technology's Technical Information Center, Room 7317, 2025 M Street, N.W., Washington, D.C.

(a) The MTA service areas are based on the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, at pages 38-39, with the following exceptions and additions:

(1) Alaska is separated from the Seattle MTA and is licensed separately.

(2) Guam and the Northern Mariana Islands are licensed as a single MTA-like area.

(3) Puerto Rico and the United States Virgin Islands are licensed as a single MTA-like area.

(4) American Samoa is licensed as a single MTA-like area.

(b) The BTA service areas are based on the Rand McNally 1992 Commercial Atlas & Marketing Guide, 123rd Edition, at pages 38-39, with the following additions licensed separately as BTA-like areas: American Samoa; Guam; Northern Mariana Islands; Mayagüez/Aguadilla-Ponce, Puerto Rico; San Juan, Puerto Rico; and the United States Virgin Islands. The Mayagüez/Aguadilla-Ponce BTA-like service area consists of the following municipios: Adjuntas, Aguada, Aguadilla, Añasco, Arroyo, Cabo Rojo, Coamo, Guánica, Guayama, Guayanilla, Hormigueros, Isabela, Jayuya, Juana Díaz, Lajas, Las Marías, Maricao, Maunabo, Mayagüez, Moca, Patillas, Peñuelas, Ponce, Quebradillas, Rincón, Sabana Grande, Salinas, San Germán, Santa Isabel, Villalba, and Yauco. The San Juan BTA-like service area consists of all other municipios in Puerto Rico.

§ 24.203 Construction requirements.

(a) Licensees of 30 MHz blocks must serve with a signal level sufficient to provide adequate service to at least one-third of the population in their licensed area within five years of being licensed and two-thirds of the population in their licensed area within 10 years of being licensed. Licensees may choose to define population using the 1990 census or the 2000 census. Failure by any licensee to meet these requirements will result in forfeiture or non-renewal of the license and the licensee will be ineligible to regain it.

(b) Licensees of 10 MHz blocks must serve with a signal level sufficient to provide adequate service to at least one-quarter of the population in their licensed area within five years of being licensed, or make a showing of substantial service in their licensed area within five years of being licensed. Population is defined as the 1990 population census. Licensees may elect to use the 2000 population census to determine the five-year construction requirement. Failure by any licensee to meet these requirements will result in forfeiture of the license and the licensee will be ineligible to regain it.

(c) Licensees must file maps and other supporting documents showing compliance with the respective construction requirements within the appropriate five- and ten-year benchmarks of the date of their initial licenses.

§ 24.204 Cellular eligibility.

(a) 10 MHz Limitation. Until January 1, 2000, no license(s) for broadband PCS in excess of 10 MHz shall be granted to any party (including all parties under common control) if the grant of such license(s) will result in significant overlap of the PCS licensed service area(s) (MTAs or BTAs) and the cellular geographic service area(s) (CGSA) of licensee(s) in the Domestic Public Cellular Radio Telecommunications Service directly or indirectly owned, operated, or controlled by the same party.

(b) 15 MHz Limitation. After January 1, 2000, no license(s) for broadband PCS in excess of 15 MHz shall be granted to any party (including all parties under common control) if the grant of such license(s) will result in significant overlap of the PCS licensed service area(s) (MTAs or BTAs) and the cellular geographic service area(s) (CGSA) of licensee(s) in the Domestic Public Cellular Radio Telecommunications Service directly or indirectly owned, operated, or controlled by the same party.

(c) Significant Overlap. For purposes of Subsections (a) and (b) of this section, significant overlap of a PCS licensed service area and CGSA(s) occurs when ten or more percent of the population of the PCS service area, as determined by the 1990 census figures for the counties contained therein, is within the CGSA(s).

(d) Ownership Attribution.

(1) For purposes of Subsections (a) and (b) of this section, "control" means majority voting equity ownership, any general partnership interest, or any means of actual working control (including negative control) over the operation of the licensee, in whatever manner exercised.

(2) For purposes of applying Subsections (a) and (b) of this section, and for purposes of Subsection (c) of Section 24.229 (40 MHz limit in same geographic area), ownership and other interests in broadband PCS licensees or applicants and cellular licensees will be attributed to their holders pursuant to the following criteria:

(i) Partnership and other ownership interests and any stock interest amounting to 5 percent or more of the equity, or outstanding stock, or outstanding voting stock of a broadband PCS licensee or applicant will be attributable.

(ii) Partnership and other ownership interests and any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of a cellular licensee will be attributable, except that ownership will not be attributed unless the partnership and other ownership interests and any stock interest amount to 40 percent or more of the equity, or outstanding stock, or outstanding voting stock of a cellular licensee if the ownership interest is held by a small business, a rural telephone company, or a business owned by minorities and/or women, as these terms are defined in Section 1.2110 of the Commission's Rules, or if the ownership interest is held by an entity with a non-controlling equity interest in a broadband PCS licensee or applicant that is a business owned by minorities and/or women.

(iii) Stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and, in the case of stock held in trust, to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust.

(iv) Non-voting stock shall be attributed as an interest in the issuing entity if in excess of the amounts set forth above.

(v) Debt and instruments such as warrants, convertible debentures, options or other interests (except non-voting stock) with rights of conversion to voting interests shall not be attributed unless and until conversion is effected, except that this provision does not apply in determining whether an entity is a small business, a rural telephone company, or a business owned by minorities and/or women, as these terms are defined in Section 1.2110 or other provisions of the Commission's Rules.

(vi) Limited partnership interests shall be attributed to limited partners and shall be calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses.

(vii) Officers and directors of a broadband PCS licensee or applicant or a cellular licensee shall be considered to have an attributable interest in the entity with which they are so associated. The officers and directors of an entity that controls a PCS licensee or applicant or a cellular licensee shall be considered to have an attributable interest in the broadband PCS licensee or applicant or a cellular licensee.

(e) [Reserved]

(f) Cellular Divestiture. Parties holding controlling or attributable ownership interests in cellular licensees may be a party to a broadband PCS application (i.e., have a controlling or attributable interest in a broadband PCS applicant), and such PCS applicant will be eligible for more than one 10 MHz broadband PCS license and/or 30 MHz broadband PCS license(s) pursuant to the divestiture procedures set forth in paragraphs (1) through (3) of this subsection; Provided, however, that these divestiture procedures shall be available only for parties with controlling or attributable ownership interests in cellular licensees where the CGSA(s) covers 20 percent or less of the PCS service area population.

(1) The broadband PCS applicant shall certify on its short-form auction application, filed in accordance with Section 24.305, that it and all parties to the application will come into compliance with the limitations on common ownership of cellular and broadband PCS interests set forth in this section.

(2) If such an applicant is a successful bidder, it must submit with its long-form application (see Section 24.307) a signed statement describing its efforts to date and future plans to come into compliance with the limitations on common ownership of cellular and broadband PCS interests set forth in this section.

(3) If such an applicant is otherwise qualified, its application will be granted subject to a condition that the licensee shall come into compliance with the limitations on common ownership of cellular and broadband PCS interests set forth in this section within ninety (90) days of final grant.

(i) Parties holding controlling interests in cellular licensees that conflict with the attribution threshold or service overlap limitations set forth above will be considered to have come into compliance if they have submitted to the Commission an application for assignment of license or transfer of control of the cellular licensee (see Section 22.39) by which, if granted, such parties no longer would have an attributable interest in the cellular license. If no such assignment or transfer application is tendered to the Commission within ninety (90) days of final grant, the Commission may consider the short-form certification and the long-form divestiture statement to be material, bad faith misrepresentations and will invoke the condition on the PCS license, cancelling it automatically, retain all monies paid to the Commission, and, based on the facts presented, take any other action it may deem appropriate. Divestiture may be to an interim trustee if a buyer has not been secured in the required time frame, as long as the applicant has no interest in or control of the trustee, and the trustee may dispose of the license as it sees fit.

(ii) Where parties to broadband PCS applications hold less-than-controlling (but still attributable) interests in cellular licensee(s), they shall submit, within ninety days of final

grant, a certification that the applicant and all parties to the application have come into compliance with the limitations on common ownership of cellular and broadband PCS interests set forth in this section.

NOTE 1: For purposes of the cellular ownership attribution limit, all ownership interests in cellular operations that serve 10 or more percent of the population of the PCS service area should be included in determining the extent of a PCS applicant's cellular ownership.

NOTE 2: When a party owns an attributable interest in more than one cellular system that overlaps a PCS service area, the total population in the overlap area will apply on a cumulative basis.

EXAMPLE 1: Company A holds a 15 percent non-controlling ownership interest in Cellular Licensee X and a 15 percent non-controlling ownership interest in Cellular Licensee Y. Cellular Licensee X covers 30 percent of the population of the PCS service area and Cellular Licensee Y covers 10 percent of the population of the PCS service area. A broadband PCS applicant in which Company A holds an attributable ownership interest will be eligible for a broadband PCS license or licenses for more than 10 MHz because Company A does not hold attributable ownership interests in cellular operations which together include ten or more percent of the population of the PCS service area.

EXAMPLE 2: Cellular Company A owns a 45 percent non-controlling interest in cellular license 1, and a 22 percent non-controlling interest in both cellular licenses 2 and 3. Cellular license 1 includes 15 percent of the pops in BTA 1. Cellular license 2 covers 7 percent of the pops in BTA 2 and 5 percent of the pops in BTA 3. Cellular license 3 covers 7 percent of the pops in BTA 3. Together Cellular licenses 1, 2 and 3 cover 9 percent of the pops in MTA 1.

If Cellular Company A is not a designated entity, it can purchase 40 MHz of spectrum in BTA 2 or in MTA 1. It can acquire only 10 MHz in BTA 1 or BTA 3 because it is considered to have ownership interests in 15 percent of the pops in BTA 1 and 12 percent of the pops in BTA 3.

If Cellular Company A wants to acquire 40 MHz of spectrum in BTA 3 it can either agree to divest either cellular license 2 or 3, or it can invest as a non-controlling investor in a PCS license that is held and controlled by a business owned by minorities and/or women.

If Cellular Company A wants to acquire 40 MHz of spectrum in BTA 1 it can agree to divest its interests in cellular license 1. It cannot invest as a non-controlling investor in a business owned by minorities and/or women because its 45 percent ownership of license 1 will be attributed, since it is greater than the 40 percent threshold.

If Cellular Company A is a designated entity, it can acquire 40 MHz of PCS spectrum in every area except BTA 1, where it is considered to have an ownership interest in 25 MHz of spectrum already because it is over the 40 percent threshold.

EXAMPLE 3: Cellular Company A owns a 45 percent non-controlling interest in cellular license 1 that covers 5 percent of the pops in BTA 1. Cellular Company A also owns a 21 percent non-controlling interest in cellular license 2 that covers 9 percent of the pops in BTA 1. If Cellular Company A is not a designated entity, then it can buy only 10 MHz of spectrum, because it is considered to have an ownership interest of 14 percent of the pops in BTA 1. If it wants to buy 30 MHz it would have to certify before the auction that it will divest either cellular license 1 or 2.

If Cellular Company A is a designated entity, then it would be considered to have an ownership interest in only 5 percent of the pops in BTA 1 and would thus be eligible to buy up to 40 MHz in BTA 1.

EXAMPLE 4: Company A holds a 10 percent interest in Cellular Licensee 1. Company B holds a 10 percent interest in Cellular Licensee 1. Cellular Licensee 1 covers more than 10 percent of the population of the PCS service area. Neither Company A nor Company B is a designated entity. A PCS entity with interests held by Company A and Company B is ineligible for a 30 MHz PCS license because the attributable ownership in cellular license 1 is 20 percent.

EXAMPLE 5: Same as Example 4 except that Company A and Company B are designated entities. The PCS entity is eligible for a 30 MHz PCS license because the attributable cellular ownership is less than 40 percent.

§ 24.229 Frequencies.

The frequencies available in the Broadband PCS service are listed in this section in accordance with the frequency allocations table of Section 2.106.

(a) The following frequency blocks are available for assignment on an MTA basis:

Block A: 1850-1865 MHz paired with 1930-1945 MHz; and
Block B: 1870-1885 MHz paired with 1950-1965 MHz.

(b) The following frequency blocks are available for assignment on a BTA basis:

Block C: 1895-1910 MHz paired with 1975-1990 MHz;
Block D: 1865-1870 MHz paired with 1945-1950 MHz;
Block E: 1885-1890 MHz paired with 1965-1970 MHz; and
Block F: 1890-1895 MHz paired with 1970-1975 MHz.

(c) PCS licensees shall not have an ownership interest in frequency blocks that total more than 40 MHz and serve the same geographic area. For the purpose of this section, PCS licensees are entities having an ownership interest of 5 or more percent or other attributable ownership interest, as defined in Section 24.204(d), in a PCS license.

EXAMPLE 1: Company A, which is a rural telephone company with no cellular interests, buys a 7 percent stake in a 30 MHz BTA that constitutes 8 percent of the population in MTA 1, which encompasses BTA 1. It is then offered an opportunity to buy 8 percent of the equity in a 30 MHz license in MTA 1. It cannot accept this offer because it would be over the 5 percent threshold on two overlapping PCS licenses. Its status as a rural telephone company has no impact on the 5 percent threshold for PCS licensees.

EXAMPLE 2: Company A has two investors, Company B and Company C. Company B owns 15 percent of Company A. Company C, a rural telephone company, owns 25 percent of Company A. Company B and Company C do not have any interests in each other.

Company B has 100 percent ownership of cellular license 1 that covers 20 percent of the pops in BTA 1 and 6 percent of the pops in MTA 1. Company C owns 25 percent of cellular license 2 that covers 20 percent of the pops in BTA 2 and 6 percent of the pops in MTA 1. Company A has no separate cellular interests. MTA 1 encompasses both BTA 1 and BTA 2.

Company A cannot purchase 30 MHz of spectrum in BTA 1. Such a purchase would put Company B over the aggregation limit of 40 MHz in BTA 1 because it would have over 5 percent ownership of the PCS license in addition to its cellular license.

Company A can, however, purchase 30 MHz in BTA 2 or MTA 1 because Company C is a rural telephone company, and thus Company C's interest in cellular license 2 falls below the 40 percent threshold and is not counted against the spectrum cap. If Company C were not a rural telephone company, then Company A could not acquire 30 MHz in BTA 2 or MTA 1 because its partners in those licenses would be over the spectrum cap.

Company B can also buy 30 MHz in BTA 2 or MTA 1 as long as Company A does not also buy 30 MHz in BTA 2 or MTA 1 because Company B and Company C have no joint ownership.

Company C can also buy 30 MHz in BTA 1 or 2 or MTA 1 as long as Company A does not also buy in the region where Company C buys. If Company A were to buy a 30 MHz MTA 1 license, then Company B and C would be prohibited from acquiring either of the BTAs because they would be over the 5 percent threshold for PCS spectrum in the same region.

(d) After January 1, 2000, licensees that have met the 5-year construction requirement may assign portions of licensed PCS spectrum. In no case may an assignee aggregate more than 40 MHz of PCS/cellular spectrum.

§ 24.232 Power and antenna height limits.

(a) Base stations are limited to 1640 watts peak equivalent isotropically radiated power (e.i.r.p.) with an antenna height up to 300 meters HAAT. See Section 24.53 for HAAT calculation method. Base station antenna heights may exceed 300 meters with a corresponding reduction in power; see Table 1 of this section. In no case may the peak output power of a base station transmitter exceed 100 watts. The service area boundary limit and microwave protection criteria specified in Section 24.236 and Section 24.237 apply.

Table 1. Reduced Power for Base Station Antenna Heights Over 300 Meters

HAAT in meters	Maximum e.i.r.p. (watts)
≤ 300	1,640
≤ 500	1,070
≤1,000	490
≤1,500	270
≤2,000	160

(b) Mobile/portable stations are limited to 2 watts e.i.r.p. peak power and the equipment must employ means to limit the power to the minimum necessary for successful communications.

(c) Peak transmit power must be measured over any interval of continuous transmission using instrumentation calibrated in terms of an rms-equivalent voltage. The measurement results shall be properly adjusted for any instrument limitations, such as detector response times, limited resolution bandwidth capability when compared to the emission bandwidth, sensitivity, etc., so as to obtain a true peak measurement for the emission in question over the full bandwidth of the channel.

§ 24.235 Frequency stability.

The frequency stability shall be sufficient to ensure that the fundamental emission stays within the authorized frequency block.

§ 24.236 Field strength limits.

The predicted or measured median field strength at any location on the border of the PCS service area shall not exceed 47 dBuV/m unless the parties agree to a higher field strength.

§ 24.237 Interference protection.

(a) All licensees are required to coordinate their frequency usage with co-channel or adjacent channel incumbent fixed microwave licensees in the 1850-1990 MHz band. Coordination

must occur before initiating operations from any base station. Problems that arise during the coordination process are to be resolved by the parties to the coordination. Licensees are required to coordinate with all users possibly affected, as determined by Appendix E of the Memorandum Opinion and Order, GEN Docket No. 90-314, FCC 94-144; TIA Telecommunications Systems Bulletin 10-F, "Interference Criteria for Microwave Systems," May 1994, (TSB10-F); or an alternative method agreed to by the parties.

(b) The results of the coordination process need be reported to the Commission only if the parties fail to agree. Because broadband PCS licensees are required to protect fixed microwave licensees in the 1850-1990 MHz band, the Commission will be involved in the coordination process only upon complaint of interference from a fixed microwave licensee. In such a case, the Commission will resolve the issues.

(c) In all other respects, coordination procedures are to follow the requirements of Section 21.100(d) to the extent that these requirements are not inconsistent with those specified in this part.

(d) The licensee must perform an engineering analysis to assure that the proposed facilities will not cause interference to existing OFS stations within the coordination distance specified in Table 2 of a magnitude greater than that specified in the criteria set forth in paragraphs (e) and (f) of this section, unless there is prior agreement with the affected OFS licensee. Interference calculations shall be based on the sum of the power received at the terminals of each microwave receiver from all of the applicant's current and proposed PCS operations.

Table 2: Coordination Distances In Kilometers

PCS Base Station Antenna HAAT in Meters

e.i.r.p. (W)	5	10	20	50	100	150	200	250	300	500	1000	1500	2000
0.1	90	93	99	110	122	131	139	146	152	173	210	239	263
0.5	96	100	105	116	128	137	145	152	158	179	216	245	269
1	99	103	108	119	131	140	148	155	161	182	219	248	272
2	120	122	126	133	142	148	154	159	164	184	222	250	274
5	154	157	161	168	177	183	189	194	198	213	241	263	282
10	180	183	187	194	203	210	215	220	225	240	268	291	310
20	206	209	213	221	229	236	242	247	251	267	296	318	337
50	241	244	248	255	264	271	277	282	287	302	331	354	374
100	267	270	274	282	291	297	303	308	313	329	358	382	401
200	293	296	300	308	317	324	330	335	340	356	386	409	
500	328	331	335	343	352	359	365	370	375	391	421		
1000	354	357	361	369	378	385	391	397	402	418			
1200	361	364	368	376	385	392	398	404	409				
1640	372	375	379	388	397	404	410	416	421				

NOTE: If actual value does not match table values, round to the closest higher value on this table. See Section 24.53 for HAAT calculation method.

(e) For microwave paths of 25 kilometers or less, interference determinations shall be based on the C/I criteria set forth in TIA Telecommunications Systems Bulletin 10-F, "Interference Criteria for Microwave Systems," May 1994, (TSB10-F).

(f) For microwave paths longer than 25 kilometers, the interference protection criterion shall be such that the interfering signal will not produce more than 1.0 dB degradation of the practical threshold of the microwave receiver for analog systems, or such that the interfering signal will not cause an increase in the bit error rate (BER) from 10E-6 to 10E-5 for digital systems.

(g) The development of the C/I ratios and interference criteria specified in paragraphs (e) and (f) of the section and the methods employed to compute the interfering power at the microwave receivers shall follow generally acceptable good engineering practices. The procedures described for computing interfering signal levels in Appendix E of the Memorandum Opinion and Order, GEN Docket No. 90-314, FCC 94-144 shall be applied. Alternatively, procedures for determining interfering signal levels and other criteria as may be developed by the Electronics Industries Association (EIA), the Institute of Electrical and Electronics Engineers, Inc. (IEEE), the American National Standards Institute (ANSI) or any other recognized authority will be acceptable to the Commission.

§ 24.238 Emission limits.

(a) On any frequency outside a licensee's frequency block, the power of any emission shall be attenuated below the transmitter power (P) by at least 43 plus 10 $\log_{10}$ (P) decibels or 80 decibels, whichever is the lesser attenuation. Compliance with this provision is based on the use of measurement instrumentation employing a resolution bandwidth of 1 MHz or greater. Nominal carrier frequency shall be adjusted as close to the licensee's frequency block edge as the design permits. Where emissions within the licensee's frequency block influence the levels measured outside the block sufficiently to show non-compliance, alternative techniques may be used provided the technique is coordinated with the Commission.

NOTE: The measurements of emission power can be expressed in peak or average values, provided they are expressed in the same parameters as the transmitter power.

(b) When an emission outside of the authorized bandwidth causes harmful interference, the Commission may, at its discretion, require greater attenuation than specified in this section.

Appendix B: List of Parties

I. Petitioners

1. Advanced Cordless Technologies (ACT)
2. Alcatel Network System, Inc. (Alcatel)
3. Alliance of Rural Area Telephone and Cellular Service Providers (Alliance)
4. American Personal Communications (APC)
5. American Petroleum Institute (API)
6. American Telephone and Telegraph (AT&T)
7. Ameritech
8. AMSC Subsidiary Corporation (AMSC)
9. Anchorage Telephone Utility
10. Apple Computer, Inc. Emergency Petition of September 13, 1993
11. Apple Petition for Reconsideration and Clarification of December 22, 1993
12. Association of Public-Safety Communications Officials (APCO)
13. Bell Atlantic Personal Communications, Inc. (Bell Atlantic)
14. BellSouth Corporation
15. Blooston, Mordorfsky, Jackson & Dickens (Blooston)
16. Chickasaw Telephone Co., Cincinnati Bell Telephone Co., Illinois Consolidated Telephone Co., Milling Telephone Co., and Roseville Telephone Co. (CCIMR)
17. Columbia Cellular Corp. (Columbia)
18. Comcast Corp.
19. COMSAT Corp. (Comsat)
20. Concord Telephone Co. (Concord)
21. Cellular Telecommunications Industry Association (CTIA)
22. Duncan, Weinberg, Miller & Pembroke, P. C. (DWMP)
23. Ericsson Corporation
24. Florida Cellular RSA Limited Partnership (Florida Cellular)
25. General Communications, Inc. (GCI)
26. GTE Service Corporation (GTE)
27. Iowa Network Services, Inc. (INS)
28. Killen & Associates, Inc.
29. LACE, Inc. (Lace)
30. McCaw Cellular Communications, Inc. (McCaw)
31. MCI Telecommunications Corp. (MCI)
32. Mebtel, Inc.
33. Metricom, Inc.
34. Motorola Inc.
35. Murray, George E. (Murray)
36. National Communications System, Manager of the (NCS)
37. National Telephone Cooperative Association (NTCA)
38. Nextel Communications, Incorporated (Nextel; formerly Fleet Call)
39. Northern Telecom Inc.
40. NYNEX Corporation

41. Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)
42. Pacific Bell and Nevada Bell (PacBell)
43. Pacific Telecom Cellular, Inc. (Pacific Telecom)
44. PacTel Corp.
45. PCS Action, Incorporated
46. Pegasus Communications, Inc. (Pegasus)
47. Personal Network Services Corp. (PNSC)
48. PMN, Incorporated
49. Point Communications Company (Point)
50. Radiofone, Incorporated
51. Rockwell International, Inc. (Rockwell)
52. Rural Cellular Association (RCA)
53. Southwestern Bell Corporation
54. SpectraLink Corporation
55. Sprint Corporation
56. State of Texas - Office of the Attorney General Petition
57. Telecommunications Industry Association - Fixed Point-to-Point Communication Section of the Network Equipment Division (TIA-NED)
58. Telecommunications Industry Association - Mobile and Personal Communications Division (TIA-Mobile)
59. Telephone and Data Systems, Inc. (TDS)
60. Personal Communications Industry Association (PCIA; formerly Telocator)
61. Time Warner Telecommunications (Time Warner)
62. TRW, Incorporated
63. U.S. Intelco Networks, Inc. (Intelco)
64. US West, Incorporated
65. Unlicensed PCS Ad Hoc Committee for 2 GHz Microwave Transition and Management (UTAM)
66. Utilities Telecommunications Council (UTC)
67. Wireless Information Networks Forum (WINForum)

II. Opposing and Commenting Parties

1. Advanced MobileComm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc. (AMT/DSST)
2. Alcatel
3. APC
4. API
5. Apple
6. Association of American Railroads (AAR)
7. Association of Independent Designated Entities (AIDE)
8. APCO

9. Bell Atlantic
10. Cablevision Systems Corporation (Cablevision)
11. Cellular Information Systems, Incorporated (CIS)
12. Cellular Telecommunications Industry Association (CTIA)
13. Citizens Utilities Company (CUC)
14. Ericsson
15. TIA-Fixed
16. General Communication, Incorporated (GCI)
17. GTE
18. Hill & Welch
19. Interdigital Communications Corporation (Interdigital)
20. KSI, Incorporated
21. Massachusetts Emergency Telecommunications Board (Mass-Emergency)
22. McCaw
23. MCI
24. Motorola
25. Murray
26. National Emergency Number Association (NENA)
27. Nextel
28. Northern Telecom
29. NYNEX
30. Omnipoint Corporation, Incorporated (Omnipoint)
31. PacBell
32. PCS Action
33. PMN
34. Qualcomm Incorporated
35. Rand McNally & Company (Rand McNally)
36. ROLM Company (Rolm)
37. SpectraLink
38. Sprint
39. TDS
40. PCIA
41. United States Telephone Association (USTA)
42. UTAM
43. UTC
44. WINForum

III. Replying Parties

1. Alcatel
2. Alliance
3. APC
4. API
5. AT&T
6. American Wireless Communication Corporation (AWCC)
7. Ameritech
8. AMSC
9. Apple
10. AIDE
11. Association of Maximum Service Television, Incorporated (AMSTV)
12. Association of Public-Safety Communications Officials-International, Incorporated (APCO)
13. Bell Atlantic
14. CTIA
15. Comcast
16. Comsat
17. Encompass
18. Ericsson
19. Federal Communications Bar Association (FCBA)
20. GCI
21. GTE
22. Hill & Welch
23. Industrial Telecommunications Association, Inc. (ITA)
24. Loral Qualcomm Satellite Services, Incorporated (LQSS)
25. McCaw
26. MCI
27. Metricom
28. Motorola
29. National Emergency Number Association (NENA)
30. National Rural Telecom Association (NRTA)
31. NCS
32. Nextel
33. Northern Telecom
34. NYNEX
35. PacBell
36. Pacific Telecom
37. PCS Action
38. PMN
39. Radiofone
40. Rand McNally
41. Rolm

42. RCA
43. Southwestern Bell
44. Sprint
45. PCIA
46. TIA-Fixed
47. Time Warner
48. Texas Advisory Commission on State Emergency Communications (Texas Emergency)
49. TRW
50. UTAM
51. UTC
52. Intelco
53. US West
54. WINForum

IV. Opposing and Commenting Parties on Apple Emergency Petition

1. Alcatel
2. APC
3. API
4. Apple
5. AT&T
6. Business Software Alliance (BSA)
7. Compaq Computer Corporation (Compaq)
8. Comsearch
9. Cox Enterprises, Inc. (Cox)
10. Hewlett-Packard Company (HP)
11. MCI
12. Metricom
13. Microsoft Corporation
14. Northern Telecom
15. Spectralink
16. UTAM
17. UTC

V. Replying Parties on Apple Emergency Petition

1. Alcatel
2. Apple
3. AT&T
4. BSA
5. Ericsson
6. HP

7. Motorola
8. Northern Telecom
9. PacBell
10. Rolm
11. UTAM

Appendix C: Final Regulatory Flexibility Analysis

Pursuant to 5 U.S.C. Section 603, an initial Regulatory Flexibility Analysis was incorporated in the Notice of Proposed Rule Making and Tentative Decision in combined ET Docket No. 92-100 and GEN Docket No. 90-314. Written comments on the proposals in the Notice of Proposed Rule Making, including the Regulatory Flexibility Analysis, were requested. A Final Regulatory Flexibility Analysis was incorporated in the Second Report and Order in GEN Docket No. 90-314.

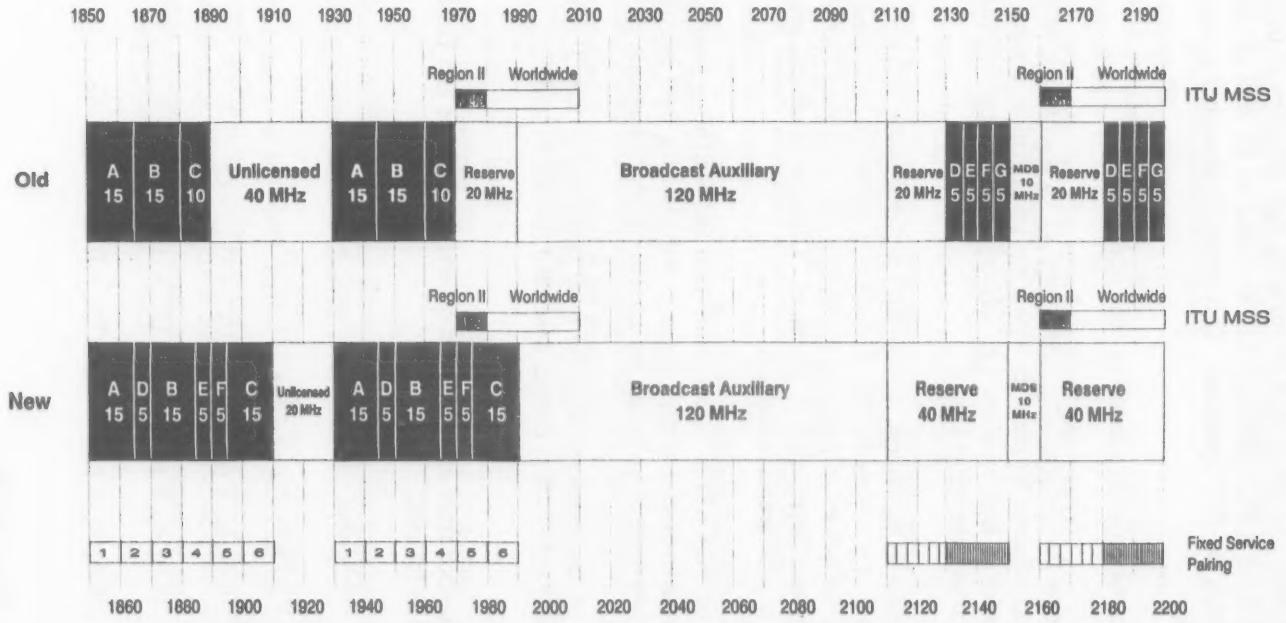
A. Need for and Objective of Rules: Our objective is to provide spectrum allocations, licensing and authorization rules, and technical standards for broadband PCS at 2 GHz. Authorizing this new service will make available a broad range of new services and technologies to both business users and consumers. The revised PCS rules will provide licensees and developers of unlicensed equipment the flexibility to introduce a wide variety of new and innovative telecommunications services and equipment.

B. Issues Raised by the Public in Response to the Initial and Final Analyses: A number of parties supported regulations that would facilitate participation in PCS by small businesses. Specifically, these parties argue that small frequency blocks, small service areas, and special consideration for small businesses in the licensing of PCS would facilitate small businesses participation in providing PCS services. The FCC empaneled a Small Business Advisory Committee (SBAC) that also assessed the policy implications of this proceeding for small businesses and filed a report with the Commission on September 15, 1993. The SBAC concluded that small frequency blocks with multiple licensees in each service area and a frequency block designated for qualified small, female, and minority businesses would assist entrepreneurial entry in PCS. The SBAC also suggested that the Commission consider other mechanisms to foster entry opportunities and capital formation for such groups. These issues and associated filings have been considered and addressed in the Second Report and Order and this Memorandum Opinion and Order, except issues related to licensee selection procedures. Licensing issues are the subject of a separate proceeding (PP Docket No. 93-253) that will establish rules to implement competitive bidding in broadband PCS. A Report and Order in that proceeding will be issued in the near future.

C. Any Significant Alternative Minimizing Impact on Small Entities and Consistent with Stated Objectives: We have reduced burdens wherever possible. The regulatory burdens we have retained are necessary to ensure that the public receives the benefits of broadband PCS in a prompt and efficient manner. We will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant impact on small entities.

Appendix D

Broadband PCS Band Plan



5082

Appendix E: A Procedure for Calculating PCS Signal Levels at Microwave Receivers

The new Rules adopted in Part 24 stipulate that estimates of interference to fixed microwave operations from a PCS operation will be based on the sum of signals received at a microwave receiver from the PCS operation. This appendix describes a procedure for computing this PCS level.

In general, the procedure involves four steps:

1. Determine the geographical coordinates of all microwave receivers operating on co-channel and adjacent frequencies within the coordination distance of each base station and the characteristics of each receiver, i.e., adjacent channel susceptibility, antenna gain, pattern and height, and line and other losses.

2. Determine an equivalent isotropically radiated power (e.i.r.p.) for each base station and equivalent e.i.r.p. values for the mobiles and portables associated with each base station. Determine the values of pertinent correction and weighting factors based on building heights and density and distribution of portables. Close-in situations, prominent hills, and extra tall buildings require special treatment.

3. Based on PCS e.i.r.p. values, correction and weighting factors, and microwave receiving system characteristics determined above, calculate the total interference power at the input of each microwave receiver, using the Longley-Rice propagation model.

4. Based on the interference power level computed in step 3, determine interference to each microwave receiver using criteria described in Part 24 and EIA/TIA Bulletin 10-F.

The interference from each base station and the mobiles and portables associated with it is calculated as follows:

$$P_{rbi} = 10\text{Log}(p_{tbi}) - L_{bi} - UC_i + G_{mwi} - C_i - BP_i$$

$$P_{rmi} = 10\text{Log}(n_{mi} \times p_{tmi}) - L_{mi} - UC_i + G_{mwi} - C_i$$

$$P_{rpsi} = 10\text{Log}(n_{psi} \times p_{tpsi}) - L_{psi} - UC_i + G_{mwi} - C_i$$

$$P_{rpbi} = 10\text{Log}(n_{pbi} \times p_{tpbi}) - L_{pbi} - UC_i - (BP_i - BH_i) + G_{mwi} - C_i$$

$$P_{rpri} = 10\text{Log}(n_{pri} \times p_{tpri}) - L_{pri} - (UC_i - BH_i) + G_{mwi} - C_i$$

where:
P refers to Power in dBm
p refers to power in milliwatts

P_{rbi} = Power at MW receiver from ith base station in dBm

p_{tbi} = e.i.r.p. transmitted from ith base station in milliwatts, which equals average power per channel x number of channels x antenna gain with respect to an isotropic antenna - line loss

L_{bi} = Path loss between MW and base station site in dB

UC_i = Urban correction factor in dB

G_{mwi} = Gain of MW antenna in pertinent direction (dBi)

C_i = Channel discrimination of MW system in dB

P_{rmi} = Power at MW receiver from mobiles associated with ith base station

p_{tmi} = e.i.r.p. transmitted from mobiles associated with ith base station

n_{mi} = Number of mobiles associated with ith base station

L_{mi} = Path loss between MW and mobile transmitters in dB

P_{rpsi} = Power at MW receiver from outdoor portables (s for sidewalk)

p_{tpsi} = e.i.r.p. transmitted from outdoor portables associated with ith base station

n_{psi} = Number of outdoor portables associated with ith base station

L_{psi} = Path loss between MW and outdoor portables in dB

P_{rpbi} = Power at MW receiver from indoor portables (b for building)

p_{tpbi} = e.i.r.p. transmitted from indoor portables associated with ith base station

n_{pbi} = number of indoor portables associated with ith base station

L_{pbi} = Path loss in dB between MW and base station site (using average building height divided by 2 as effective antenna height)

P_{rpri} = Power at MW receiver from rooftop portables (r for rooftop)

p_{tpri} = e.i.r.p. transmitted from rooftop portables associated with ith base station

n_{pri} = Number of rooftop portables associated with ith base station

L_{pri} = Path loss in dB between MW and base station site (using average building height as effective antenna height)

BP_i = Building penetration loss at street level in dB

BH_i = Height gain for portables in buildings dB = 2.5 x (nf-1), where nf is number of floors

Note: where C_i varies from channel-to-channel, which often is the case, the summation process is more complex, requiring summation at a channel level first.

Finally, the total PCS interference power at a given microwave receiver from all the base stations in a given frequency band is found by summing the contributions from the individual stations. Likewise, the total interference power at a given microwave receiver from all mobiles and portables operating in a given frequency band is found by summing the contributions from the mobiles and portables associated with each cell.

$$p_{rb} = \sum_{i} p_{rbi} \quad \text{milliwatts}$$

$$p_{rm} = \sum_{i} (p_{rmi} + p_{rpsi} + p_{rpbi} + p_{rpri}) \quad \text{milliwatts}$$

$$P = 10 \text{ Log}(p) \quad \text{dBm}$$

Base Stations. Interference from each base station to each microwave should normally be considered independently. A group of base stations having more or less (within ± 50 percent) the same height above average terrain, the same e.i.r.p., basically the same path to a microwave receiving site, and subtending an angle to that receiving site of less than 5 degrees, may be treated as a group, using the total power of the group and the average antenna height of the group to calculate path loss, L.

Mobile Stations. The e.i.r.p. from mobile transmitters is weighted according to the number of base station channels expected to be devoted to mobile operation at any given time. The antenna height of mobiles used in calculating path loss, L, is assumed to be 2 meters.

Portable Stations. The e.i.r.p. from the portable units associated with each base station is weighted according to the estimated portion of portables associated with that cell expected to be operated inside buildings at any given time and the portion which could be expected to be operating from elevated locations, such as balconies or building rooftops. For example, in the case of service intended for business use in an urban area, one might expect that perhaps 85 percent of the portables in use at any given time would be operating from within buildings and perhaps 5 percent might be operating from rooftops or balconies. The remaining 10 percent would be outside at street level.

Calculation of an equivalent e.i.r.p. for cells in suburban areas will involve different weighting criteria.

Urban Correction Factor. The urban correction factor (UC) depends on the height and density of buildings surrounding a base station. For the core area of large cities, it is assumed to be 35 dB. For medium size cities and fringe areas of large cities (4- to 6-story buildings with scattered taller buildings and lower buildings and open spaces) it is assumed to be 25 dB; for small cities and towns, 15 dB, and for suburban residential areas (one- and two-story, single family houses with scattered multiple-story apartment buildings, shopping centers and open areas), 10 dB.

The unadjusted urban correction factor, UC, should not be applied to base station antenna heights that are greater than 50 percent of the average building height for a cell.

Building Height and Building Penetration Factors. The building height correction, BH, is a function of the average building height within the nominal coverage area of the base station. It is used in conjunction with the building penetration loss, BP, to adjust the expected interference contribution from that portion of the portables transmitting from within buildings. The adjustment is given by:

BP = 20 dB in urban areas
BP = 10 dB in suburban areas

BH = 2.5 x (nf-1) dB

where nf is the average height (number of floors) of the buildings in the area.

(Note that this formula implies a net gain when the average building height is greater than 8 floors). All buildings more than twice the average height should be considered individually. The contribution to BH from that portion of portables in the building above the average building height should be increased by a factor of 20Log(h) dB, where h is the height of the portables above the average building height in meters.

Channel Discrimination Factor. A factor based on the interference selectivity of the microwave receiver.

Propagation Model. The PCS to microwave path loss, L, is calculated using the Longley-Rice propagation model, Version 1.2.2., in the point-to-point mode. The Longley-Rice [1] model was derived from NBS Technical Note 101 [2], and updated in 1982 by Hufford [3]. Version 1.2.2 incorporated modifications described in a letter by Hufford [4] in 1985. Terrain elevations used as input to the model should be from the U.S. Geological Survey 3-second digitized terrain database.

Special Situations. If a cell size is large compared to the distance between the cell and a microwave receiving site so that it subtends an angle greater than 5 degrees, the cell should be subdivided and calculations should be based on the expected distribution of mobiles and portables within each subdivision.

If terrain elevations within a cell differ by more than a factor of two-to-one, the cell should be subdivided and microwave interference calculations should be based on the average terrain elevation for each subdivision.

If a co-channel PCS base station lies within the main beam of a microwave antenna (±5 degrees), there is no intervening terrain obstructions, and the power at the microwave receiver from that base station, assuming free space propagation, would be 3 dB or less below the interference threshold, interference will be assumed to exist unless the PCS licensee can demonstrate otherwise by specific path loss calculations based on terrain and building

losses.If any part of a cell or cell subdivision lies within the main beam of a co-channel microwave antenna, there is no intervening terrain obstructions, and the accumulative power of 5 percent or less of the mobiles, assuming free space propagation would be 3 dB or less below the interference threshold, interference will be assumed to exist unless the PCS licensee can demonstrate otherwise by specific path loss calculations based on terrain and building losses.

If a building within a cell or cell subdivision lies within the main beam of a co-channel microwave antenna, there is no intervening terrain obstructions, and the cumulative power of 5 percent or fewer of the portables, assuming free space propagation, would be 3 dB or less below the interference threshold, interference will be assumed to exist unless the PCS licensee can demonstrate otherwise by specific path loss calculations based on terrain and building losses.

References:

1. Longley, A.G. and Rice, P.L., "Prediction of Tropospheric Radio Transmission Loss Over Irregular Terrain, A Computer Method-1968", ESSA Technical Report ERL 79-ITS 67, Institute for Telecommunications Sciences, July 1968.

2. Rice, P.L., Longley, A.G., Norton, K.A., Barsis, A.P., "Transmission Loss Predictions for Tropospheric Communications Circuits," NBS Technical Note 101 (Revised), Volumes I and II, U.S. Department of Commerce, 1967.

3. Hufford, G.A., Longley, A.G. and Kissick, W.A., "A Guide to the use of the ITS Irregular Terrain Model in the Area Prediction Mode", NTIA Report 82-100, U.S. Department of Commerce, April 1982. Also, Circular letter, dated January 30, 1985, from G.A. Hufford, identifying modifications to the computer program.

4. Hufford, G.A., Memorandum to Users of the ITS Irregular Terrain Model, Institute for Telecommunications Sciences, U.S. Department of Commerce, January 30, 1985.

Appendix F

Permissible Ownership of PCS Licenses by the Owners of Same-Area Cellular Systems

(A same-area cellular system is one covering 10 % or more of the population within the PCS service area.)

Ownership Interest in Cellular License:	Permissible PCS Ownership:
Below 20 %	No special restriction. May own 100 % of PCS licenses totalling not more than 40 MHz of spectrum.
Designated entity with up to 40 % non-controlling interest in a cellular license.	No special restriction. May own 100 % of PCS licenses totalling not more than 40 MHz of spectrum.
Non-designated entity with up to 40 % non-controlling interest in a cellular license.	May own a non-controlling interest in PCS licenses with up to 40 MHz controlled by women or minorities. (Assuming option to buy 10 MHz of 15 MHz not exercised).
All others.	May own 100 % of PCS licenses totalling not more than 10 MHz for 5 years and 15 MHz thereafter.

Note All entities may have investments of less than 5 % in any PCS license without attribution.

STATEMENT OF
COMMISSIONER JAMES H. QUELLO

Re: Amendment of the Commission's Rules to Establish New Personal Communications Services, GN Docket No. 90-314.

Personal Communications Services (PCS) is a subject that has received a good deal of my time and attention. I have often reiterated my belief that the Commission must move forward as expeditiously as practicable to complete the reconsideration of the PCS rules so that we may begin licensing this family of advanced mobile communications services. The public interest is served best by having early access to an array of lower-cost, ubiquitous, location-independent communications.

I strongly support this Memorandum Opinion and Order. I want to congratulate Chairman Hundt for his leadership in bringing our efforts to closure and thank my fellow Commissioners for their invaluable contributions. I wish to commend the extraordinary efforts of the PCS Task Force and virtually all of the Commission staff in giving birth to a family of new mobile communications services known collectively as PCS.

I have long maintained that there is no "holy grail" of regulatory perfection. The "best rule" is the one that has been promulgated. Although I do not believe that any regulatory scheme can ever be "perfect," I do believe that this item is one of which we can be justifiably proud. It is the product of sustained hard work and thorough evaluation. The American public will benefit in many ways for many years to come by the action taken by the Federal Communications Commission in this proceeding.

Establishing the regulatory framework, while implementing a new licensing procedure mandated by Congress, for a major new communications industry such as PCS, is a complex and time-consuming task. I am convinced that the Commission staff, under the leadership of Chairman Hundt, has valiantly met the challenge. The Commissioners share the vision of a robust competitive new personal mobile communications industry that will benefit the American people in the very near future.

Although sixty-six petitions for reconsideration were filed, the number is deceiving because the parties essentially restated the positions they took during the notice and comment process. Little new information was presented. The Commission acted responsibly in empaneling the PCS Task Force to assist us in determining which issues merited reconsideration.

Through the efforts of the Task Force and extensive public commentary, the Commission was able to analyze the petitions thoroughly and find common ground for agreement in fine-tuning the plan adopted in the Second Report and Order. We are now able to turn our attention to the competitive bidding rules for broadband PCS and, shortly thereafter, commence the licensing process.

Prompt licensing of PCS meets the business needs of the potential competitors. They must know the "ground rules" so that they may finalize their business plans, complete market studies and technical trials, forge alliances, attract financing, establish standards and manufacture equipment.

We have responded by moving forward expeditiously. The Commission has adopted previously the generic competitive bidding (auction) rules and the regulatory framework for narrowband PCS. Today we take another significant -- and final -- step toward making PCS a reality. I am satisfied that the FCC is proceeding apace but we must not slacken our efforts; much work remains. We must resolve any issues and adopt the auction rules for broadband PCS in short order.

June 9, 1994

Separate Statement

of

Commissioner Andrew C. Barrett

Re: Broadband PCS Reconsideration Order

Our action today addresses the concerns I raised in my dissent with respect to the PCS allocations band plan adopted in September 1993. More than anything else, this reconsideration decision demonstrates: A. the policy vision necessary to permit the evolution of a viable, competitive PCS market; B. the potential synergies that can be created between various licensed PCS providers, and between licensed and unlicensed PCS providers; and C. the balanced analysis required to allow certain flexibility for cellular investment in PCS. My compliments to the Chairman, the PCS Task Force, and the Commission staff, on reconfiguring our PCS decision to give every potential new entrant a realistic opportunity to compete in our future wireless infrastructure. I fully support this decision, and look forward to addressing the remaining challenges with respect to our auction rules and the rules to promote real opportunities for designated entities to bid for and operate PCS licenses.

The three 30 Mhz allocations, two at the MTA level and one at the BTA level will provide significant opportunities for new entrants to compete against cellular providers and the emerging Enhanced Specialized Mobile Services [ESMR] market. This new framework achieves one of my policy goals of ensuring that at least 3 new PCS providers have a real opportunity to offer competitive alternatives to existing cellular players. In all three 30 Mhz licenses, new entrants have an opportunity to start service as soon as possible, while addressing the spectrum sharing or relocation issue with fixed microwave incumbents. Clearly, time to market will be critical for PCS to compete against the headstart of existing cellular and ESMR players. Our decision today will permit the rapid deployment of PCS services.

The 30 Mhz BTA allocation gives an opportunity for designated entities to raise capital and bid for a reasonably sized PCS license in over 490 markets throughout the country. The remaining 20 Mhz allocation for unlicensed spectrum will prove useful to portable data and voice applications. The potential licensed and unlicensed PCS synergies for portable voice applications could create additional exciting market developments. Our modification to unlicensed channelization requirements also will promote efficient spectrum uses in the 20 Mhz unlicensed band.

Although I was concerned about the usefulness and technical operation problems presented by the four 10 Mhz slivers adopted in the upper band [above 2 Ghz] of our September 1993 PCS Order, I am satisfied upon reconsideration that our three 10 Mhz BTA allocations in this Order are far improved for three reasons: 1. The technical equipment problem presented by dual-mode handsets operating between the upper and lower band has been eliminated--all 10 Mhz allocations are now in the lower band below 2 Ghz; 2. The three 10 Mhz allocations can be aggregated into 20 or 30 Mhz licenses at the BTA level in the lower band, thus creating the possibility of a fourth full-service PCS license in certain markets; and 3. The 10 Mhz allocations can be used as either niche services, with equipment that is also compatible in the larger 30 Mhz license areas, or can be combined in ventures with the larger 30 Mhz license areas to create 40 Mhz PCS operations for higher bandwidth requirements. These significant advantages outweigh my concerns about the efficacy of each individual 10 Mhz PCS license as a standalone operator.

Beyond the spectrum allocation and market size issues, I support our efforts to devise attribution rules which will promote a competitive PCS market. In combination with our 40 Mhz spectrum cap, these attribution rules should ensure that no undue influence can be brought to bear in the PCS licensing process by cellular entities in-market, or any other PCS licensee who would seek to circumvent our spectrum cap limit. In this regard, I also support our decision to impose a 35 Mhz spectrum cap on cellular for the first 5 years of PCS, and allow them to acquire an additional 5 Mhz to reach the 40 Mhz PCS spectrum cap after 5 years. Given the significant headstart of cellular entities, who have a cumulative capital investment of approximately $10-12 billion dollars, and a cumulative revenue stream of approximately $10-12 billion dollars, I am primarily concerned that new PCS entrants have a real opportunity to attempt to compete against such a market advantage. Further, given that cellular is experiencing customer growth in some areas of up to 40%, I believe new PCS entrants will have a significant hurdle to overcome by the time they introduce services in the market within 12-18 months after receiving a license in the auction. Thus, I support the more restrictive broadband PCS spectrum cap on cellular for 5 years.

Our decision also balances cellular eligibility with respect to the 20% equity ownership and 10% population overlap standard. While retaining this standard from the September 1993 Order, this Order makes several changes which support my views on allowing cellular to provide expertise in the PCS market under certain circumstances: 1. allow more flexible cellular non-controlling attribution in a PCS license owned by a designated entity, where a cellular entity owns a non-controlling in-market cellular interest of 40% or less; 2. allow more flexible cellular attribution for purposes of PCS licensing where a designated

entity, including rural telephone companies, owns a non-controlling in-market cellular interest of 40% or less; and 3. allow a cellular company with an attributable population overlap between 10 and 20% to divest enough cellular interests to solve the PCS in-market eligibility problem, by either selling cellular licenses to get below the 10% overlap standard, or selling enough of a cellular equity interest to get under the 20% equity attribution requirement in licenses causing the 10-20% overlap situation. These measured exceptions to our 20/10 attribution and overlap rules will promote cellular participation in limited circumstances.

This decision also emphasizes our serious concern that the PCS industry should move aggressively to adopt technical equipment and PCS operating standards that will permit interoperability among various type of PCS systems. Similar to the roaming requirements in the cellular industry, I am interested in ensuring that industry takes the lead to solve interoperability issues for the consumer before their services come to market. We are not dictating any single approach in this regard, only that the interoperability solution or solutions are sufficient to make differences between various types of PCS network configurations invisible to the PCS consumer.

Finally, the Order adopts more flexible power limit standards, 1000 watts E.R.P., and relaxes construction period requirements for 30 Mhz and 10 Mhz PCS licensees. I support these decisions, and believe they will give new PCS entrants an opportunity to deploy PCS infrastructure in an economic manner. Our subsequent auction Order for broadband PCS should address further issues regarding partitioning of PCS license areas for purposes of additional buildout flexibility.

Our decision today gives PCS a real opportunity to become a significant part of our future wireless infrastructure. The collective parts of this decision add up to an Order which thoroughly considers the various components necessary to make PCS a viable infrastructure alternative for future wireless consumers.[1] As I indicated in my prior dissent, our job is not

---

[1] In addition, this Order preserves the upper band above 2 Ghz for MSS worldwide allocations, and commits to a future proceeding to seek more MSS spectrum for domestic uses. This aspect of the PCS proceeding required significant consideration and analysis. In weighing the costs and benefits of implementing an integrated PCS allocation framework, I decided that the following benefits outweigh the costs of pursuing MSS spectrum needs in other proceedings: 1. the band plan in this Order creates opportunities for economies and efficiencies in equipment manufacturing for PCS services; and 2. this new band plan allows terrestrial PCS to create significant new economic activity in

to satisfy every lobbying effort from the multitude of interests involved in this complex proceeding; rather our job is to establish a framework for PCS based on the extensive record in this docket; a framework which will allow new PCS entrants to provide viable competitive choices for consumers. Today, we take that step. Our next challenge will be to implement auction rules that promote an efficient licensing process and give Designated Entities real, viable opportunities to participate in this major infrastructure opportunity. I look forward to working with my colleagues to resolve these issues and start the process of implementing PCS services in the U.S by the end of this year.

---

the near term, in terms of new businesses, new competitive service providers, and expanded opportunities for existing businesses.

SEPARATE STATEMENT OF COMMISSIONER SUSAN NESS

Re: In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services--Memorandum Opinion and Order, Gen. Docket No. 90-314

With this historic decision, an important new sector of the telecommunications industry at last becomes a reality. The Personal Communications Service (PCS) should, in the short-term, prove to be a viable new source of competition to existing commercial mobile and private mobile radio services. In the not-too-distant future, PCS will be synonymous with feature-rich services beyond the imagination of today's consumers. It will also free subscribers from the limitations of the wireline network.

At the heart of today's decision is the modified bandplan. Consolidating and repositioning the PCS allocation at the lower end of the Emerging Technologies Band will eliminate the need for dual mode handsets, thereby hastening service deployment by as much as a year. Having fewer microwave incumbents in that spectrum should reduce the over-all costs of the PCS licensee. Grouping all PCS blocks together in the lower part of the band will encourage the creation of more competitive entrepreneurial niche services which could have been isolated in the upper band under the original plan. Equalizing the amount of spectrum alloted to the A, B and C blocks should make all three channel blocks attractive investment opportunities. Preserving a mix of blocks by geographic size and bandwidth will enable bidders to pursue a wide variety of visions and strategies for introduction of PCS. Finally, the revised plan will restore much of the global allocation for mobile satellite service.

By pausing briefly to reconsider the Second Report and Order in this proceeding, the Commission has forged ahead with a plan that better serves the public, enhances competition between existing mobile telephone providers and new entrants, encourages participation by a diversified group of new players, and furthers our global initiatives for mobile satellite services. Expediting the introduction of competition should help reduce retail prices and inspire a variety of new service offerings. Finally, the improved bandplan enhances the value of the spectrum and should result in a robust auction that will fairly compensate the public for the licensing of their scarce spectrum resource.

While I fully endorse the revised bandplan, I am concerned that the 20 MHz of "sweet spectrum" allocated to unlicensed PCS may be insufficient to fully accommodate the needs of both the data and voice users. I am intrigued by many of the potential applications for unlicensed PCS, and will be mindful of these uses when we address additional spectrum allocations in a future proceeding.

I applaud the Commission's PCS Task Force for achieving industry consensus on an issue that has been fraught with controversy. Indeed, the open exchange of ideas between the Commission and the industry that has characterized the PCS reconsideration should serve as a model for the agency's rule making and policy activities. Many staff members worked around-the-clock to deliver a final product that is thoughtful, complete, and fully supported by the record before us. Their hard work will enable us to move forward expeditiously with the broadband auction.

Now that this Commission has finalized many of the spectrum and licensing issues surrounding PCS, we will move immediately to establish procedures for auctioning broadband PCS before the year's end. Those wishing to give further thought to the broadband auction process will now have the final bandplan upon which to base their views. I fully appreciate the importance of maintaining our rapid pace towards the licensing and implementation of PCS, and I remain confident that our actions today are a timely affirmation of this agency's commitment to a strong and competitive PCS industry.

Chairman Hundt is to be commended for his skilled leadership and his willingness to take into account the various viewpoints that have been expressed during this proceeding. I feel very privileged to have arrived at the Commission in time to participate fully in this decision, which I wholeheartedly support.

SEPARATE STATEMENT OF

COMMISSIONER RACHELLE B. CHONG

Re: In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services -- Memorandum Opinion and Order, Gen. Doc. No. 90-314

I am very pleased to support this item. I have been following the birth of this innovative wireless industry with great personal interest for some time. I believe that broadband PCS is going to introduce vigorous competition into the wireless telecommunications marketplace. This competition will bring many benefits to consumers. It will increase the consumer's ability to choose service providers. Moreover, increased competition should produce lower rates.

PCS will bring innovative communications services to the American public. PCS clearly is going to be more than just portable telephones similar to cellular phones. Portable lightweight PCS devices will allow us to utilize wireless technology to send faxes or transfer computer files, receive a written urgent message on a pager, or pull up news, stock quotes or sports scores no matter where we are. This surely will improve the quality of our lives and help us become more efficient and informed people. These innovative services will challenge other players in the wireless market to be just as creative in identifying new services that meet consumer needs.

I congratulate the many interested players in the PCS industry for their creative suggestions concerning the revised bandplan set forth in this decision. This is an excellent example of how many industries can work together to develop consensus and improve regulation. I am particularly pleased that this bandplan preserves spectrum designated for Mobile Satellite Service at the 1992 World Administrative Radio Conference. This, along with our commitment in this item to initiate a proceeding to allocate additional spectrum for MSS domestically and to work toward having additional spectrum allocated to MSS at the World Radio Conference in 1995, recognizes the importance of global communications and the leadership role of the United States in that arena.

I think that this bandplan is superior. It will result in less expensive and more lightweight handsets. It will provide two different spectrum sizes, so that PCS providers can bid for how much spectrum their proposed service actually needs, not amounts of spectrum that the FCC has guessed that they need. This bandplan will get PCS services to the public faster. Finally, I am pleased that we have committed in this item to look toward allocation of additional spectrum for unlicensed PCS operations.

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 94R-12
Washington, D.C. 20554

CC Docket No. 91-142

In re Applications of

ALGREG CELLULAR ENGINEERING File No. 10607-CL-P-307-A-89

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block A,
in Market 307, Alabama 1 - Franklin

CRANFORD CELLULAR COMMUNICATIONS File No. 10611-CL-P-311-A-89

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block A,
in Market 311, Alabama 5 - Cleburne

NEW ERA CELLULAR TELE-COMMUNICATIONS File No. 10563-CL-P-332-A-89

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block A,
in Market 332, Arkansas 9 - Polk

BAY CELLULAR OF FLORIDA — File No. 10754-CL-P-497-A-89

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block A,
in Market 497, Mississippi 5 - Washington

FLORIDA CELLULAR — File No. 10445-CL-P-505-A-89

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block A,
in Market 505, Missouri 2 - Harrison

A-1 CELLULAR COMMUNICATIONS — File No. 10454-CL-P-514-A-89

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block A,
in Market 514, Missouri 11 - Moniteau

BRAVO CELLULAR — File No. 10673-CL-P-579-A-89

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block A, in
Market 579, North Carolina 15 - Cabarrus

ALPHA CELLULAR — File No. 10909-CL-P-586-A-89

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block A,
in Market 586, Ohio 2 - Sandusky

CEL-TEL COMMUNICATIONS — File No. 10912-CL-P-589-A-89

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block A,
in Market 589, Ohio 5 - Hancock

EJM CELLULAR PARTNERS — File No. 10567-CL-P-596-A-89

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block A,
in Market 596, Oklahoma 1 - Cimarron

PINELLAS COMMUNICATIONS — File No. 10808-CL-P-613-A-89

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block A,
in Market 613, Pennsylvania 2 - McKean

CENTAUR PARTNERSHIP — File No. 10720-CL-P-631-A-89

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block A,
in Market 631, South Carolina 7 - Calhoun

SIGNAL CELLULAR COMMUNICATIONS — File No. 10721-CL-P-632-A-89

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block A,
in Market 632, South Carolina 8 - Hampton

A-1 CELLULAR COMMUNICATIONS — File No. 10409-CL-P-661-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 661, Texas 10 - Navarro

EJM CELLULAR PARTNERS — File No. 10116-CL-P-721-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 721, Wyoming 4 - Niobrara

SATELLITE CELLULAR SYSTEMS — File No. 10037-CL-P-318-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 318, Arizona 1 - Mohave, for Station KNKN 268

JAYBAR COMMUNICATIONS — File No. 10042-CL-P-323-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 323, Arizona 6 - Graham, for Station KNKN 251

DATA CELLULAR SYSTEMS — File No. 10029-CL-P-345-A-88
File No. 07080-CL-MP-91

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 345, California 10 - Sierra, for Station KNKN 250

CELLULAR PACIFIC

File No. 10031-CL-P-346-A-88
File No. 06606-CL-MP-90
File No. 06688-CL-MP-90

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block A,
in Market 346, California 11 - El Dorado,
for Station KNKN 252

NORTH AMERICAN CELLULAR

File No. 10066-CL-P-388-A-88

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block A,
in Market 388, Idaho 1 - Boundary,
for Station KNKN 253

ALPHA CELLULAR

File No. 10318-CL-P-410-A-88

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block A,
in Market 410, Indiana 8 - Brown,
for Station KNKN 340

For assignment of Station KNKN 340
in the Domestic Public Cellular
Telecommunications Radio Service
on Frequency Block A, in Market 410,
Indiana 8 RSA

File No. 04924-CL-AL-1-90

ALEE CELLULAR COMMUNICATIONS

File No. 10074-CL-P-555-A-88

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block A,
in Market 555, New Mexico 3 - Catron,
for Station KNKN 271

CRYSTAL COMMUNICATIONS SYSTEMS File No. 10078-CL-P-606-A-88

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block A,
in Market 606, Oregon 1, Clatsop,
for Station KNKN 309

Appearances

Robyn G. Nietert, David J. Kaufman, and Lorretta K. Tobin on behalf of Algreg Cellular Engineering; John W. Pettit, John P. Bankson, Jr., Neal M. Goldberg, and Sue W. Bladek on behalf of Cranford Cellular Communications, New-Era Tele-Communications, A-1 Cellular Communications, Alee Cellular Communications, Cel-Tel Communications, Jaybar Communications, Pinellas Communications, Centaur Partnership, Bay Cellular of Florida, and EJM Cellular Partners; Larry S. Solomon and Dan J. Alpert on behalf of Bravo Cellular and Florida Cellular; Alan Y. Naftalin and Herbert D. Miller, Jr. on behalf of Alpha Cellular; David L. Hill and Audrey P. Rasmussen on behalf of Signal Cellular Communications, Data Cellular Systems, Cellular Pacific, and, North American Cellular (Mr. Hill and Ms. Rasmussen also formerly represented Satellite Cellular Systems and Crystal Communications Systems before the Board in this proceeding); Stephen Kaffee on behalf of Satellite Cellular Systems and Crystal Communications Systems; Peter Gutmann on behalf of Pepper & Corazzini; Clifford M. Harrington, Eliot J. Greenwald, Scott R. Flick, and Barry H. Gottfried on behalf of Applicants Against Lottery Abuse; Carl W. Northrop, Rosemary T. Rakas, and E. Ashton Johnston, on behalf of Thomas Domencich and the Committee for a Fair Lottery; Donald J. Evans on behalf of Miller Communications, Inc. and Skywave Partners, Inc.; Richard S. Myers on behalf of Buckhead Cellular Communications Partnership; James F. Ireland, III and John Davidson Thomas on behalf of Cellular Applicants' Coalition, Inc.; William Zimsky on behalf of ZDT Partnership; and, Carmen Cintron and Joseph Weber on behalf of the Chief, Common Carrier Bureau.

DECISION

Adopted: June 27, 1994; Released: July 22, 1994

By the Review Board: MARINO (Chairman) and GREENE. Board Member GREENE issuing a Statement.

Board Chairman MARINO:

SUMMARY

1. This multi-party case requires the Review Board to decide: (a) whether fifteen applications selected pursuant to the Commission's lottery rules are eligible to receive construction permits for cellular (radio) facilities; and (b) whether the licenses of eight other parties also selected by lottery may be revoked. At the heart of this case is a Mutual Contingent Risk-Sharing Agreement (MCRSA) crafted by The Cellular Corporation (TCC). TCC not only prepared the twenty-three captioned applications filed by the applicants and licensees at issue in this case but approximately 11,500 other applications interconnected by the MCRSA that was designed to skew the rural market lotteries in favor of the TCC-prepared applications. To ensure success of the scheme, the MCRSA, for a considerable period of time, was deliberately not disclosed to the Commission. For reasons detailed below, we hold: (a) that the winning lottery applications must be dismissed as defective, pursuant to 47 CFR §§ 22.20 and 22.26(b), in light of specific findings of rule violations supported by a very substantial factual record; and (b) that based on our own independent review of the record, the licenses must be revoked, pursuant to 47 U.S.C. § 312(a)(2), because the licensees' principals knowingly participated in the TCC scheme to maximize their chances of winning the lotteries and cooperated in efforts to conceal information about the MCRSAs from the Commission and their competitors. By filing applications for cellular radio facilities, the parties here subjected themselves to high standards of candor first upheld in FCC v. WOKO, Inc., 329 U.S. 223, 227 (1946). The record establishes, however, that they failed to satisfy even "relatively low standards of disclosure." Lorain Journal Co. v. FCC, 351 F. 2d 824, 830 (D.C. Cir. 1965).

TABLE OF CONTENTS

		Paragraphs
I.	SUMMARY	1
II.	INTRODUCTION	2-7
	A. PARTIES AND PLEADINGS	2-4
	B. NATURE OF THE DISPUTE	5-7
III.	FACTUAL BACKGROUND	8-23
IV.	HEARING DESIGNATION ORDER	24-29
V.	INITIAL DECISION	30-34
VI.	APPLICANTS	35- 59
	A. EXCEPTIONS	35
	B. CHALLENGES TO HDO	36- 40
	C. SUFFICIENCY OF THE EVIDENCE	41
	D. PARTICIPATION IN THE AGREEMENT	42- 51
	E. MITIGATION	52- 57
	F. PROCEDURAL MATTERS	58- 59

VII.	LICENSEES		60- 85
	A.	MCRSA ISSUE	61- 72
	B.	PROCEDURAL ARGUMENT	73- 76
	C.	SECONDARY ISSUES: FALSE CERTIFICATION AND §1.65	77- 78
	D.	ALIEN AND RELATED LACK OF CANDOR	79- 82
	E.	ABUSE OF PROCESS: FORFEITURE	83- 84
	F.	MISCELLANEOUS	85
	G.	SUMMATION	86
VIII.	ORDERING CLAUSES		87- 93

INTRODUCTION

2. Parties and Pleadings. The case comes to the Board on exceptions to the Initial Decision, 7 FCC Rcd 8686 (1992) (I.D.), of Administrative Law Judge Walter C. Miller (ALJ), which denied the 15 above-captioned Rural Service Area (RSA) cellular applications, revoked the 8 RSA licenses, and imposed $25,000 forfeitures against certain of the licensees for purported discovery derelictions. The exceptions fall essentially into three categories. First, exceptions to the ALJ's denial of fifteen applications have been filed by the thirteen applicants: Algreg Cellular Engineering (Algreg), Cranford Cellular Communications (Cranford), New Era Cellular Tele-Communications (New Era), Bay Cellular of Florida (Bay), Florida Cellular (Florida), A-1 Cellular Communications (A-1) -- two applications, Bravo Cellular (Bravo), Cel-Tel Communications (Cel-Tel), EJM Cellular Partners (EJM) -- two applications, Pinellas Communications (Pinellas), Centaur Partnership (Centaur), Signal Cellular Communications (Signal), and Alpha Cellular (Alpha). Second, exceptions to the revocations of eight licenses have been filed by the licensees: Satellite Cellular Systems (Satellite), Jaybar Communications (Jaybar), Data Cellular Systems (Data), Cellular Pacific (Pacific), North American Cellular (North American), Alpha, Alee Cellular (Alee), and Crystal Communications (Crystal). For the sake of clarity, the two groups of parties identified above will hereinafter be referred to as "Applicants" and "Licensees." Alpha excepts as both an aggrieved applicant and licensee and also as an applicant for assignment of its license, which the I.D., at ¶ 30 (Concl.) dismissed as moot. Satellite, Crystal, Pacific, and North American also except to imposition of forfeitures against them.

3. The third group of exceptions consists of adversarial intervenors: Applicants Against Lottery Abuses (AALA), Thomas Domencich and the Committee for a Fair Lottery (CFL), Miller Communications, Inc., Skywave Partners, Inc., Buckhead Cellular Communications Partnership, Cellular Applicants' Coalition, ZDT Partnership, and the law firm of Pepper & Corazzini (P&C). A former Pepper & Corazzini attorney, William J. Franklin, was counsel to TCC and the creator of the disputed MCRSA. Litigation against Pepper & Corazzini

stemming from Franklin's involvement in the MCRSA is pending in the United States District Court for the District of Columbia and in the Superior Court for the District of Columbia. See I.D., n.160. The balance of the intervenors comprise applicants or applicant groups that filed unsuccessful cellular applications in the RSA lotteries at issue here. Algreg Cellular Engineering, 6 FCC Rcd 5299 (Rev. Bd. 1991). The ALJ also denied applications filed by TNT Communications, and the Board earlier dismissed TNT's applications for failure to file exceptions. Algreg Cellular Engineering, 8 FCC Rcd 2226 (Rev. Bd. 1993),

4. Due to the extraordinary length and complexity of this proceeding, the parties were granted additional time and pages for their exceptions and replies. See Letter from Allan Sacks, Chief for Law, to Carmen Borkowski, *et al.*, December 31, 1992. After the Applicants and Licensees together filed more than 400 pages of exceptions, the Commission's Common Carrier Bureau responded in a 170-page consolidated reply, precipitating the filing of motions to strike by all of the Applicants and Licensees because the Bureau's brief exceeded the 25-page limit permitted each party. The Bureau asserted that its brief met procedural requirements because it was entitled to 25 pages to respond to each brief filed by its opponents, but it is mistaken. See Filing of Reply Briefs Before the Review Board, 41 RR 2d 1422 (Rev. Bd. 1977) ("[A] party may file a single reply pleading of no more than 25 pages."); see also Kaye F. Thomas, 8 FCC Rcd 7630, 7630 & n.2 (Rev. Bd. 1993). However, given the large number of parties filing exceptions, their length, and the Bureau's special burdens, see para. 28 below, good cause exists for accepting the Bureau's reply and we will deny the motions to strike. The other parties also submitted reply briefs. The Board heard oral argument in the proceeding on December 10, 1993. Board Member Norman Blumenthal fully participated in the oral argument, see oral arg. tr. 13225, subsequent Board discussion, and tentative vote, but died on May 11, 1994, before reviewing a draft of this Decision.

5. Nature of the Dispute. The Cellular Corporation, TCC, is an entity specifically formed in 1984 to market and prepare cellular applications following the Commission's decision to utilize a lottery licensing process for the Domestic Public Cellular Radio Telecommunications Service. TCC prepared the captioned twenty-three applications selected in nonwireline RSA cellular lotteries held from September 1988 to December 1989. This number represents only a tiny fraction of more than 7,000 TCC-prepared applications filed in lotteries for all or nearly all of 428 RSA rural markets by the Applicants and Licensees. Other TCC applicants who were not selected in the lotteries filed an additional 4,500 applications. All 11,500 TCC applications were linked by two nearly identical profit and risk sharing agreements, identified earlier as the MCRSA, conceived by TCC to enhance the lottery odds in favor of the linked applications. One Agreement, for the eastern applicants, was signed by twelve of the winning parties: Algreg, Cranford, New Era, A-1, Alee, Cel-Tel, Jaybar, Pinellas, Centaur, Bay, EJM, and Florida. All but

EJM are located in New Jersey and Florida. EJM is in Texas. Those parties filed applications in all 428 markets. The version for the western applicants includes the other eight winning parties: Alpha, Bravo, Signal, Data, Pacific, North American, Crystal, and Satellite. Those parties are located in California and Hawaii. They generally filed for 250 RSA markets. As the agreements are identical in substance, differing only in ways not pertinent here, they are referred to in the singular.

6. The eight Licensees won in the early rounds of the lotteries and received their respective licenses between July and October, 1989. Algreg and Cranford were selected as lottery winners on August 23, 1989, and amended their lottery-winning applications on October 25, 1989, to disclose that they were signatories to the MCRSA. The MCRSA attached to the amendments identified many of the other Applicants and Licensees before us as co-signatories. The remainder of the party Applicants soon filed similar amendments, and the Licensees, who no longer had pending applications to amend, filed informational statements to the same effect. Only Alpha claimed not to have entered the MCRSA, although it filed an informational statement on November 28, 1989, reporting that it had been identified as a MCRSA signatory. Buckhead Exh. 40. On December 7, 1989, the Commission rescinded the construction permit it had issued to Florida on November 20th and, on the following day, announced receipt of the amendments by Public Notice, Report No. CL-90-57. Shortly thereafter, the parties informed the Commission that they had voted to rescind the MCRSA. The western applicants reported the rescission to the Commission on December 19, 1989. See I.D., ¶ 513 n.113. The eastern applicants were unable to obtain the approval of all signatories necessary for rescission, but they notified the Commission that their partners had voted to unilaterally rescind their agreement. Id. ¶ 166 & n.46. Neither Alpha nor Algreg participated in the rescission efforts. Id. at n.46 & ¶ 691.

7. On December 29, 1989, AALA filed a petition to dismiss or deny against the winning TCC Applicants. It also filed a request for institution of revocation proceedings against the Licensees on January 4, 1990, contending that the profit and risk sharing agreement violated the Commission's rules. Another adversary, CFL, filed similar motions on January 4 and 17, 1990. In response, the Mobile Services Division of the Commission's Common Carrier Bureau launched a 16-month investigation of the alleged MCRSA participants, see Public Notice, Report No. CL-90-92, released January 31, 1990. The Bureau's investigation culminated in the release of a tripartite consolidated order: (a) ruling that the MCRSA violated Commission rules; (b) designating the Applicants for hearing; and (c) instituting a revocation proceeding against the Licensees. Algreg Cellular Engineering, 6 FCC Rcd 2921, 2930 n.8 (Com.Car.Bur.), corrected, 6 FCC Rcd 3547 (Mob.Ser.Div. 1991) (Hearing Designation Order; hereinafter "HDO"). Before discussing the HDO in detail, we turn to the Commission's regulatory history concerning cellular

licensing and TCC's role in the instant dispute.

FACTUAL BACKGROUND

8. In 1981, the Commission enacted rules to govern the commercial implementation of the cellular radio service. See Report and Order in Cellular Communications Systems, 86 FCC 2d 469 (1981); modified, 89 FCC 2d 58; further modified, 90 FCC 2d 571 (1982); petition for review dismissed, United States v. FCC, No. 82-1526 (D.C. Cir. 1984). At the outset, the Commission utilized "expedited" or "paper" comparative hearings for selecting licensees among cellular applications for the largest 30 Metropolitan Statistical Areas (MSAs). Thereafter, in 1984, the Commission concluded that, in the wake of significant delays experienced in instituting cellular service inherent in comparative hearings, the public interest would be better served if licensees were selected randomly by lotteries among the competing applications in all other MSA and smaller rural markets (RSA). See Report and Order in Cellular Lottery Rulemaking, 98 FCC 2d 175 (1984), recon., 101 FCC 2d 577, further recon., 59 RR 2d 407 (1985), aff'd in relevant part, Maxcell Telecom Plus, Inc. v. FCC, 815 F. 2d 1551 (D.C. Cir. 1987). At that time, the Commission believed that settlements among competing cellular applicants would expedite an inauguration of cellular service to the public. 98 FCC 2d at 196-97. Because enactment of the lottery rules took place after applications for MSA markets 31-90 had already been filed, the Commission encouraged applicants already on file to enter into partial settlements by awarding settlement participants the number of lottery chances that the individual applicants would have had if no partial settlement had been reached. 98 FCC 2d at 201. Thus, applicants participating in settlements could increase their likelihood of obtaining a cellular ownership interest and simultaneously reduce the risks inherent in a random selection process by mutually agreeing to convey a portion of their ownership interests if they became the tentative licensee.

9. After the first post-lottery applications had been filed for MSA markets 91-120, the Commission recognized by the increased volume of filings that its policy of permitting parties to obtain ownership interests in more than one application for the same market "ha[d] become an incentive for promoters to create abusive filing schemes involving large numbers of speculative, insincere and unacceptable applications." Cellular Radio Lotteries (Recon.), 101 FCC 2d at 585. The Commission received more than 5000 applications, "a staggering increase over the previous rounds even though the new markets [were] less populous." Id. It therefore amended its rules to prohibit multiple ownership in applications for the same market, exempting only those interests below 1%. Groups of individual applicants for the MSA markets exploited the 1% exemption by entering into partial settlements called "alliances," under which any group member winning the lottery would retain a 50.01% ownership interest in the license and the other

alliance members would share equally the remaining 49.99% ownership interest, subject to the 1% proviso. See generally Third Report and Order, 4 FCC Rcd 2440 (1988).

10. By late 1984, after the Commission had adopted lottery procedures, TCC had commenced operations marketing and preparing applications for investors in the MSA markets beyond the top-120. AALA Exh. 8 at 3-4; Bureau Exh. 47 at 81; Tr. 1505-06. For the MSA applications, and later for the RSA applications, TCC utilized a network of regional brokers paid on a commission basis for soliciting sales. Tr. 1514-18. TCC exercised very little direct supervision over the brokers, primarily keeping them apprised of what was going on in the industry, processing and supervising the accuracy of their paperwork, conducting seminars on the brokers' behalf, and paying commissions. Tr. 1599-1600. Alliances played a significant role in TCC's marketing efforts, and most of TCC's MSA clients eventually joined an alliance. Tr. 1508, 1512. TCC's initial marketing activities, along with those of other cellular application preparer companies, quickly attracted the attention of the Federal Trade Commission (FTC), which entered into a consent decree with TCC and others in 1986. Alpha Exhs. 10-11. The FTC had alleged that TCC had violated 15 U.S.C. § 45 by falsely representing that any FCC applicant "is likely to obtain all or part of a cellular telephone license." I.D., ¶¶ 21-25; Alpha Exh. 11.

11. By 1986, having been inundated with 100,000 MSA application filings and anticipating even more for the smaller RSA markets, the Commission concluded that further inquiry was necessary regarding its policies on partial settlements and the 1% exemption. See Further Notice of Proposed Rule Making, 1 FCC Rcd 499 (1986). On October 16, 1986, it released a Public Notice announcing its proposal to prohibit all partial settlements among competing RSA cellular applicants. Following these actions, TCC hired William J. Franklin of Pepper & Corazzini to prepare and file comments with the Commission opposing the elimination of partial settlement groups. AALA/CFL Exh. 8 at 4-5. At about this same time, TCC's founder and then sole shareholder, Nicholas R. Wilson, addressed potential customers at an initial sales seminar on RSA applications, where he promoted a "business plan" that "could take the place of any loss that would ... [be] suffered ... [if] the alliances... [were] revoked." Tr. 1523-25. The plan was apparently premised on an "ability to separate the license from future revenues without [allegedly] violating any FCC rules." Tr. 1525.

12. At the early RSA sales seminars, Wilson made presentations and the brokers scheduled appointments with prospective clients. Tr. 1529. Wilson acknowledged that the Commission had proposed the elimination of alliances but stated that TCC did not believe that the Commission would take any action on the matter. AALA/CFL Exh. 269 at 1-2. TCC continued to indicate to prospective investors that there was a very good chance that the Commission would permit

alliances. Id. In the main, the TCC customers were the same people who had purchased MSA applications and had through lotteries won shares of licenses in the MSAs. Tr. 1523.

13. In a March 29, 1988 letter, prompted by Congressional hearings investigating cellular license speculation, Gregory Neely, who had succeeded Wilson as TCC's President in 1987, advised the brokers that it would not be prudent to pursue Wilson's business plan and instead suggested that their clients combine to form regional partnerships that would file applications in all of the RSA markets. Bureau Exh. 47 at 1-2, 66-67; Tr. 1975-76. Under this arrangement, each individual's percentage of ownership would be calculated by dividing the number of applications purchased by the total number of investors joining the partnership. The investors could even further increase their chances of winning by placing family members in separate partnerships. Bureau Exh. 47 at 1-2, 66-67. The suggested elimination of the business plan evoked an immediate outcry from the brokers who complained that their sales had been based on the promise of an alliance or a business plan and believed that they would be called upon to refund fees to dissatisfied customers. Tr. 1976-77. By this time, TCC had completed most of its sales of applications, the majority of which had originally been purchased by individual applicants who had contracted to participate in 25 and 100 RSA markets apiece. Tr. 1542, 2350; AALA/CFL Exh. 8 at 6. Neely responded with the linked regional partnership concept, which was later to become the risk sharing agreement and MCRSA. Tr. 1978; AALA/CFL Exh. 8 at 9.

14. Under Neely's new plan, which expanded on his earlier regional partnership scheme, each partnership applicant (comprised of a number of TCC customers filing in each RSA market) would enter into an agreement with nine other such TCC partnerships, so that in the event a linked applicant was selected in the lottery for a given RSA market, it would retain the license but would share 50% of future profits or proceeds with the other linked partnerships. AALA/CFL Exh. 4 at 7. As Neely described it, his linked partnership concept merely added substance to Wilson's original business plan, retaining the original concept of separating ownership and control of the license from some percentage of shared future profits in the market, but increasing the probability of a return on investment. Tr. 1593.

15. TCC introduced Neely's linked partnership program to its clients at seminars held on April 27, 1988, at Cranford, New Jersey and Madiera Beach, Florida, and on June 7, 1988, at Oceanside, California. Tr. 1593, 7149-55; AALA/CFL Exh. 274. Correspondence announcing the plan was also sent to TCC's Texas broker, Edward Massey (who later formed EJM) explicitly acknowledging that the proposed two-tier plan, *i.e.,* forming the individual applications into regional partnerships and linking the resulting partnerships, was

designed "[t]o help stack the odds in our favor." AALA/CFL Exh. 193 at 2-3. At the seminars, TCC began the formation of the regional partnerships, with the last of the Agreements of General Partnership signed on July 1, 1988. Centaur Exh. 1, Att. 2. The Partnership Agreements provided for the partners to select managers who could execute contracts on behalf of the respective partnerships. Bureau Exh. 47 at 110. Frequently, the TCC brokers who assigned the investors into particular partnerships also served as the initial manager of the partnership, a position in which the individual was not required to be a partner, and appointed one of the partners (often a relative) to be the applicant's signing partner. See, e.g., Tr. 4026, 5604, 7182, 7555.

16. On May 18, 1988, the Commission released the text of its newly revised Rural Service Area rules prohibiting: (1) partial settlements among nonwireline carriers; (2) any ownership interest, including those of less than 1%, in more than one application in a market; and, (3) alienation of any interest in an RSA application prior to the grant of a construction authorization. See Third Report and Order, 4 FCC Rcd at 2440-44. Immediately thereafter, TCC received a prophetic letter from Fred Marsh whose company utilized TCC's services for preparing and filing cellular applications. Marsh berated TCC for publicly promoting a prohibited revenue sharing scheme and thereby jeopardizing its clients' applications. He averred that it was widely known that the FCC would not tolerate any such scheme; that any responsible preparer would observe not only the letter of the FCC's rules but the spirit as well; that TCC had often publicized that it had a business plan which cleverly circumvented the FCC's final position on sharing schemes; and that TCC was "playing Russian Roulette with six chambers of the gun loaded, hoping for a misfire." Bureau Exh. 16 at 2-3. TCC's counsel, William Franklin, assured Marsh's attorney that TCC was not promoting any revenue sharing proposal. Bureau Exh. 17.

17. Following Marsh's rebuke and Neely's receipt of the new RSA rules, Neely met with Franklin on May 25, 1988, to discuss TCC's linkage plan. Tr. 1651-52, 2351-52. Franklin advised Neely that a slightly modified version of the linkage arrangement, whereby the parties to the plan received a right to share in distributed profits rather than an automatic right to share in any profits, was permissible under the rules. Tr. 2423-28. On June 3, 1988, Franklin transmitted to Neely the first draft of the modified linkage plan bearing the title "Mutual Contingent Risk-Sharing Agreement," identified earlier in para. 1 above as the MCRSA. AALA/CFL Exh. 11 at 1. Franklin assured Neely that, based on the Commission's historic interpretation of the concept of "ownership," he was comfortable that the MCRSA risk sharing agreement was consistent with the new rules. Id.

18. By mid-June 1988, TCC had completed sales of the applications, and by July 1988, it had begun filing applications for the first block of (RSA) rural markets. Tr. 1674, 2042. Because no linking agreement had yet been formally executed and the first lotteries were scheduled for September 23, 1988, Neely asked Franklin to explain the MCRSA to the TCC clients at four seminars scheduled for August 1988, in New Jersey and Florida. Tr. 2709. At the initial seminar, held on August 23rd at Rockledge, Florida, Neely reported to the applicants that the FCC had, in the initial rounds, received double the number of RSA applications originally predicted. AALA/CFL Exh. 23 at 5-7. Inasmuch as TCC's projected chances of winning had thereby been reduced by half (i.e., 1.4 lottery wins per partnership based on linking together every 10 partnerships, see AALA Exh. 193 at 3), Neely suggested that the ten Florida partnerships, the single Texas partnership, and the twelve New Jersey partnerships join together in a larger linking arrangement, thus restoring TCC's original projection of lottery wins per market. AALA/CFL Exh. 23 at 6-7. He offered to include his own individual proprietorship application, Algreg, into the arrangement linking partnerships in the eastern United States. Neely stressed that the important point was having the necessary numbers to ensure a successful ratio in the lotteries. Id. at 4.

19. Franklin assured the participants at the Rockledge, Florida seminar that the linkage concept embodied by the risk sharing agreement (MCRSA) would be acceptable to the Commission. He declared:

> the concept which we've come up with at Greg [Neely]'s request in terms of linking partnerships is something that is, fits around FCC's rules. I've seen it in some other contexts, that once you, if the FCC says you cannot do "A" and you come up with a concept which completely satisfies that rule, the FCC does not go beyond that. It's not what they intended to do, it's what they wrote in the rule, and that is the concept we've implemented.
>
> * * *
>
> What we are proposing is something which the FCC has never thought of. If I went to them and said Mr. FCC Staff Person what do you think about this, he would say, "no you can't do it, it's not what we want."

* * *

> The FCC -- how can I say this -- they're like little kids at Christmas in a sense, in that they want to believe in the people that won the lotteries; they don't want to hold a re-lottery, they want to take whoevers' ping pong ball was picked, give them the construction permit and get their paper out the door so they can move on to do something else. I mean the FCC staff people have a difficult job in that they're the small end of a very big funnel of paperwork and the only way they can keep up, especially with the way the government budgets are going, is not to give a lot of time to things but to move ahead and grant them.
>
> On that basis, it's my professional opinion basically that what we're proposing would be acceptable to the FCC. Probably -- it's hard to say -- with a, I don't know, 90, 95, or 98% chance of being approved in its present form.

Id. at 10-11. Neely added that TCC did not "want to make light of the fact that if there was a petition to deny . . . Bill [Franklin] says there is a 2-5% chance that the FCC would cause . . . our winning applications to be dismissed because we violated this so-called indirect involvement in other applications." Id. at 11-12 (emphasis added).

20. Similar seminars were held at St. Petersburg, Florida and Cranford and Edison, New Jersey. Jaybar Exh. 2 at 2; Bureau Exhs. 67, 88. The format and content were essentially the same. Tr. 2476-77. At each one, Franklin and Neely spoke about the need for the partnerships to determine whether they were in favor of joining the linked partnership program and linking the Florida, Texas, and New Jersey applications. Tr. 4479. In addition to these seminars, Franklin participated in a recorded telephone conference call on September 20, 1988 with the TCC representatives in California and Hawaii about linking their applications together or a similar arrangement. AALA/CFL Exh. 28. Franklin explained that because the MCRSA would give applicants a "mere contractual right" in distributed profits and the Commission regulates only ownership interests, the MCRSA "falls outside of what the FCC requires to be reported." Id. at 10-12. "There is no duty in my mind

that a winning applicant who had signed this agreement, would ever . . . is not . . . you're not required to report it to the FCC." Id. On the chances of the FCC disapproving the MCRSA, Franklin said: "if you talk about a scale of 100, you have got a 50% chance that this is never going to come to the FCC's attention . . . we've taken care of 50% of the chances, which is [the] FCC doesn't find out about it. . . of the remaining 50%, some place between 40 and 45% of the time, the FCC would at the initial instance, would affirm the linking program the way it's done." Id.

21. Subsequent to the seminars and conference call and the discussions among the brokers and the individual partnerships on the MCRSA, see AALA/CFL Exhs. 76-79, 130-32, the brokers distributed ballots to the partners for their votes to enter the MCRSA, and on completion, Franklin sent copies of the MCRSA to the brokers to obtain signatures. Tr. 1752. The MCRSA involving the Florida, Texas, and New Jersey applicants was executed on September 16, 1988; and the MCRSA for the California and Hawaii applicants was executed on September 22, 1988. Bureau Exhs. 1 at 19-34, 25 at 5-13. The MCRSA was not disclosed in the applications filed after the September execution dates even though Section 22.923(b)(7) of the Commission's rules requires RSA applicants to certify on the application transmittal sheet that "there are no agreements or understandings, other than those specified in this application, which provide that someone other than the applicant shall have an indirect or direct ownership interest."

22. Nearly one year later, on August 25, 1989, at a conference conducted by Cellular Magazine for management companies to attract RSA lottery winners to enter into management contracts, one of the TCC brokers, Alan Kane, on Neely's request, approached David Kaufman of the law firm Brown Finn & Nietert, which represented some of the individual lottery winners associated with TCC, and requested his legal views on the MCRSA. Tr. 1846-49, 12245, 12253. TCC had from early 1988 envisioned developing a construction management company "dealing in the cellular telephone industry." Tr. 1821-22. By 1989, Neely, Kane, and other TCC-affiliated brokers had in fact formed a separate company, Crystall Communications, Inc., for the purpose of constructing and managing RSA systems in return for equity interests. Tr. 4133-36. The Crystall/TCC principals had become concerned that the profits that were to be distributed to the losing linked partnerships pursuant to the MCRSA presented a reporting problem on financial statements for Crystall and other publicly traded operating companies offering to buy interests in the winning systems. Tr. 1824-28.

23. At a September 21, 1989 meeting attended by Neely and the Crystall/TCC principals, and Franklin briefly, Kaufman submitted a memorandum prepared by his law firm tentatively recommending that the MCRSA be disclosed to the Commission. Tr. 11906, 11913-14; Bureau Exh. 104. Inasmuch as Kaufman's and Franklin's legal advice differed, no final decision was reached on this point. Tr. 11925-26, 11941-42. By September 25, 1989, Kaufman had unequivocally decided that disclosure was required and sent letters to the most recent lottery winners, Cranford and Algreg, informing them that they should report the MCRSA to the Commission by amendments to their respective applications. Tr. 11948, 11960-61. At a meeting on October 17, 1989, attended by RSA partnership managers who had missed the earlier meeting and presumably were represented by Kaufman, it was agreed that Kaufman would initiate the disclosures of the MCRSA to the Commission. AALA/CFL Exh. 115. An amendment drafted by Kaufman's firm disclosing the MCRSA was sent to the participating Brown Finn clients (not wholly identified in the record) on October 25, 1989, and the amendments of these clients and the other Applicants (and letters by Licensees) ensued. Tr. 11992-94; AALA/CFL Exhs. 7, 119, 125, 151, 154, 173, 187, 199, 217, 221, 225, 240, 340, 345, 348; Buckhead Exh. 15.

HEARING DESIGNATION ORDER

24. At the conclusion of the Commission investigation, supra para. 7 the Chief, Common Carrier Bureau, acting pursuant to delegated authority, found that the MCRSA violated the Commission's prohibitions against partial settlements and multiple ownership interests in competing applications. HDO, 6 FCC Rcd at 2924-25. Section 22.33(b)(2) provides that "[p]artial settlements among non-wireline applicants for Rural Service Areas are prohibited." 47 CFR § 22.33(b)(2) (1991). The HDO found that the MCRSA "constitute[s] an arrangement among fewer than all of the applicants in the markets under which the parties to the Agreement[] enjoy reciprocal interests in each others' applications. Each would receive a portion of the profits and sales proceeds of any cellular system built, operated and sold by any of the other parties to the Agreement," in violation of the prohibition against partial settlements in 47 CFR § 22.33. 6 FCC Rcd at 2925. "The Agreement['s] clear purpose and effect is to improve an applicant's ability to participate in a winning application." Id. Section 22.921(b)(1) in turn states: "[f]or Rural Service Areas, no party to a non-wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, including an interest of less than one percent." 47 CFR § 22.921(b)(1) (1991). The HDO determined that the rights afforded the participating applicants in each other's same market applications are "prohibited ownership interests," in violation of Section 22.921. 6 FCC Rcd at 2925. These ownership rights include the right to share profits and proceeds, to copy and inspect records and books of licensees, to receive and review material contracts

entered into by licensees for sale of system, to regularly receive certified financial statements, and to enforce these rights by specific performance. Id. The HDO found the MCRSA represents "exactly the type of abuse that the Commission outlawed in adopting the cross-ownership ban. In these cases, the lotteries were skewed; each signatory could receive benefits even if its application did not win a lottery." Id.

25. Because the MCRSA conveys "ownership" interests in the participating applications, the HDO further stated that parties who entered the Agreement after filing their applications violated the Commission's proscription against the transfer of interests in pending cellular applications -- Section 22.922. Id. That rule provides:

> the sale, transfer, assignment or other alienation of any cellular application to offer service to Rural Service Areas is prohibited prior to the grant of a construction authorization. This restriction on transfers of interests in such cellular applications shall include any form of alienation, including option arrangements and agreements, as well as equity and debt placement plans.

47 CFR § 22.922 (1991). Thus, any applicant who entered into the unlawful risk-sharing agreement "has filed a defective application or rendered its application defective" and "[t]hese rule violations require dismissal." 6 FCC Rcd at 2927-28, 2931 n.34. The HDO held (id. at 2928):

> In this proceeding, the only question to be resolved is whether the individual applicants have, in fact, entered into the Agreements or otherwise taken actions which made them parties to the risk sharing provisions. Accordingly, we will specify an issue inquiring into each applicant's actions with regard to these Agreements.

26. Finally, the HDO declared that those parties who signed the MCRSA prior to filing their applications and failed to disclose the MCRSA falsely certified their applications because 47 CFR § 22.923(b)(7) (1991) requires parties to certify, *inter alia,* that: "there are no agreements or understandings, other than those specified in this application, which provide that someone other than the applicant shall have an indirect or direct ownership interest." Moreover, those who entered into the MCRSA after their applications were filed and failed to inform the Commission of this fact within a reasonable time failed to keep their applications substantially complete as required by Section 1.65 of the Commission's rules. Id. at 2925-26. Section 1.65(a) requires applicants to amend their applications as promptly as possible and, in any event, within thirty days, unless good cause is shown, "whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects" or "there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application." 47 CFR § 1.65(a) (1991). The HDO determined that the parties' efforts to disassociate themselves from the Agreement were "insufficient to avoid sanctions for the apparent violations of the rules" and "too late in the process to be given any consideration." 6 FCC Rcd at 2926. The HDO also declared that the Licensees' participation in the MCRSA, standing alone, was not necessarily grounds for revocation of the licenses. Id. at 2928. By footnote, the HDO stated that Alee had informed the Commission that it (Alee) had an alien general partner when it filed its application, which had never been disclosed, and added alien ownership and lack of candor issues. Id. at 2931 n.24.

27. The following issues were therefore specified against Applicants Algreg, Cranford, New Era, Bay, Florida, A-1, Bravo, Alpha, Cel-Tel, EJM, Pinellas, Centaur, and Signal:

> (1) To determine all the facts and circumstances surrounding the applicants' involvement with the Agreements.
>
> (2) To determine, based on the evidence adduced in issue (1) above, which if any of the applicants entered into the Agreements.
>
> (3) To determine, based on the evidence adduced above, which if any of the applications should be denied.

Id. at 2928. The burden of proceeding with the introduction of evidence and the burden of proof were placed upon the applicants. Id.; see also 47 U.S.C. § 309(e).

Mitigation evidence was declared not pertinent to the resolution of these issues. 6 FCC Rcd at 2931 n.34.

28. The eight Licensees: Satellite, Jaybar, Data, Pacific, North American, Alpha, Alee, and Crystal, were ordered to show cause why their cellular authorizations should not be revoked. The issues, which relate to matters common to all as well as the alien ownership inquiry peculiar to Alee, are as follows:

> (1) To determine all the facts and circumstances surrounding the permittees['] involvement in the Agreements.
>
> (2) To determine, based on the evidence adduced in (1) above, which if any of the permittees entered into the Agreements.
>
> (3) To determine whether the permittees who entered into the Agreements falsely certified their applications (Section 22.923) or violated Section 1.65 of the rules with regard to their applications when they were pending.
>
> (4) To determine whether Alee Cellular lacked candor in failing to reveal to the Commission an alien general partner or that it changed the nature of its partnership.
>
> (5) To determine whether Alee Cellular complied with the requirements of Section 310(b) of the Communications Act and Section 22.4 of the rules.
>
> (6) To determine, based on the totality of the evidence adduced pursuant to 1, 3, 4 and 5 above, whether the permits of any of the captioned permittees should be revoked.

Id. The burden of proceeding with the introduction of evidence regarding the revocation of licenses was placed upon the Commission's Common Carrier Bureau,

pursuant to Section 312(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 312(d). Although the HDO was silent in this respect, 47 U.S.C. § 312(d) also assigns the burden of proof to the Commission's Bureau.

29. The Presiding Judge later added a seventh issue against four licensees (I.D., ¶¶ 8-9):

> (7) To determine if Satellite Cellular Systems, Cellular Pacific, North American Cellular, and Crystal Communications System have abused the Commission's processes by failing to comply with valid discovery requests, and if not whether they possess the requisite character qualifications to be a Commission licensee.

INITIAL DECISION

30. At hearing, the ALJ admitted some 600 written exhibits into evidence, heard from 57 witnesses, and compiled over 13,000 pages of testimony. Id. ¶ 12 (Concl.). In the resulting comprehensive 730-paragraph I.D., the ALJ chronicled the history of TCC and its pursuits in the MSA and RSA lotteries; traced TCC's development, promotion, and implementation of the RSA risk-sharing program which culminated in the MCRSA; and described the formation and operation of each lottery-winning MCRSA participant before us, including their participation in the risk-sharing program.

31. The ALJ found that before the Commission developed rules to govern RSA filings in 1988, TCC had already pre-sold 11,500 RSA applications to 341 investors under the express promise that they could improve their chances in the lotteries by entering into partial settlements or alliances. Id. ¶ 1 (Concl.). He further found that TCC had maintained it would implement a "business plan" designed to achieve the same results as alliances should the Commission disallow partial settlements for RSA applicants. Id. When the Commission announced that it was banning alliances for non-wireline RSA applicants in April 1988, the ALJ recited, TCC offered its clients the opportunity to join the risk-sharing program, wherein each participant promised to share 50% of its profits with other program participants. Id. ¶¶ 1-3 (Concl.). The program was later formalized by each participant's execution of the MCRSA. The ALJ observed: "[s]tated simply, rather than return the money to their investor-clients, TCC and their brokers embarked on an elaborate plan to circumvent the Commission's newly developed RSA rules against alliances and partial settlements." Id. ¶ 4 (Concl.). Essential to

the success of TCC's plan, the ALJ determined, was its concealment from the Commission, which might disapprove it, and from potential competitors, who might use it as a basis for filing petitions to deny against participating TCC applications. Id. ¶ 5 (Concl.).

32. After considering the evidence, the ALJ determined that all Applicants and Licensees at bar, including Alpha, were informed and willing participants in the secret TCC risk-sharing agreement. Id. ¶ 8 (Concl.). Alpha's unique claim that it was never party to the MCRSA was rebuffed as "totally spurious." Id. at n.158. The I.D. concluded that by entering into the MCRSA, all of the Applicants and Licensees violated Sections 22.33(b)(2) (partial settlements), 22.921 (multiple applications), and 22.922 (alienation), and that each of these violations formed an independent basis for denial of the applications and revocation of the licenses. Id. ¶¶ 18-19 (Concl.). The ALJ found that Pinellas committed two violations of Section 22.921 and that Bay twice violated Section 22.922. Id. ¶ 19 (Concl.). All but five of the Applicants and Licensees were found to have also violated Section 22.923(b)(7) for falsely certifying their applications, which the ALJ found provided yet another basis for denial of the applications and revocation of the licenses. Id. ¶ 21 (Concl.). The ALJ observed that the Bureau and the intervenors failed to make false certification cases against New Era, Alee, Florida, EJM, or Crystal. On the other hand, he found that Bay and Alpha each falsely certified two applications. Id.

33. By entering into the agreements and then failing to amend their applications to report such activity for more than one year after entering into the MCRSA, all parties were deemed to have violated Section 1.65. Because this failure to report decisionally important information was "deliberate and egregious" in the ALJ's view, it, too, formed a separate ground for denial or revocation. Id. ¶ 20 (Concl.). The I.D. resolved the remaining designated issues adversely to Alee finding that its original application contained an alien partner and that Alee had lacked candor in its attempt to conceal that information from the Commission. Id. ¶ 22 (Concl.). Finally, the ALJ resolved the abuse of process issue against Satellite, Crystal, Pacific, and North American ruling that these licensees had "deliberately thwarted legitimate inquiries into their cellular application activities by refusing to comply with valid document discovery requests." Id. ¶ 23 (Concl.). Because such misconduct in a proceeding of this size and complexity is intolerable, he concluded, it is disqualifying and further warrants forfeitures in the amount of $25,000 against each licensee. Id. ¶¶ 23-24 (Concl.).

34. In deciding to deny the applications and revoke the licenses, the ALJ rejected the parties' efforts to blame their non-compliance with the Commission's rules and policies on TCC's communications counsel, William Franklin:

> Most of the key individuals in these ... partnerships; *i.e.,* signing partners, managing partners *etc.,* were fully aware of the breadth and terms of the scam TCC was attempting to perpetrate. In fact the conclusion is warranted that almost all of the partners in each of the ... partnerships were fully cognizant of TCC's efforts to implement an RSA "business plan" that would achieve the same results as the MSA alliances, and they willingly participated in that implementation.

Id. ¶¶ 8-9 (Concl.). Contrary to the HDO's express direction, the ALJ permitted all of the designated parties, including the applicants, to proffer showings of mitigation for his consideration in assessing the consequences of their violations. Id. ¶¶ 12-15 (Concl.). Although nineteen mitigation showings were submitted, the ALJ rejected them all finding them "half-hearted," "poorly-presented," and, ultimately, unconvincing. Id. ¶ 25 (Concl.).

APPLICANTS

35. Exceptions. Four Applicants, Cranford, New Era, A-1, and Cel-Tel, consolidated their exceptions in a joint brief, hereinafter Cranford Jt. Br. Four other Applicants Pinellas, Centaur, Bay, and EJM, joined Licensee Jaybar in a consolidated brief, hereinafter Jaybar Jt. Br. A joint brief, hereinafter Bravo/Florida Br., was filed by Applicants Bravo and Florida. Applicants Algreg and Signal submitted their briefs individually, as did Applicant and Licensee Alpha. Applicants urge the Board to reverse the I.D's denial of their applications. In addition to challenging the validity of the conclusions expressed in the Bureau Chief's HDO, the Applicants argue that the ALJ applied an erroneous legal standard in determining that the Applicants entered into the MCRSA and that he ignored their showings of mitigation in assessing the ultimate sanction of disqualification. More specifically, they maintain the following: first, relying on principles of state law, that they cannot be considered parties to the MCRSA because they are not "bound" by the Agreement such that it would be enforceable in a court of law; second, asserting ignorance, reliance on counsel, and lack of ill purpose, that they did not intend to violate the rules nor did they realize the extent of the potential consequences of their actions; and third, that the sanctions

assessed by the ALJ (and mandated by the HDO) are unduly harsh and that they should be permitted to cure any disqualifying defects and to retain their authorizations. They further question the overall sufficiency of the evidence and the ALJ's objectivity in light of his alleged disdain for the Commission's cellular lottery process. As we will elaborate in the following passages, these exceptions fail to reveal reversible error on the part of the ALJ.

36. Challenges to HDO. Initially, despite our earlier admonishment to the parties to refrain from submitting arguments directed at the validity of the HDO to the Board, see Letter from Allan Sacks, Chief for Law, to John W. Pettit, Esquire, *et al.*, March 2, 1993, at 3, some of the Applicants question the HDO's essential conclusion that the Agreement violates the Commission's rules and policies. See Algreg Br. at 2, 15; Bravo/Florida Br. at 32-33, 42-44; Signal Br. at 15-16. Several parties dispute the HDO's pronouncement that participation in the Agreement mandates dismissal of the allied applications without reference to the surrounding circumstances. See Algreg Br. at 22-23; Cranford Jt. Br. at 63, 84; Bravo/Florida Br. at 22-27, 44. Similarly, some Applicants revisit their contentions first raised in pre-designation pleadings that they cannot be deemed parties to the MCRSA because it has been rescinded and, in any event, has ceased to bind them due to the operation of a fail-safe clause which nullified the Agreement once it was determined to be violative of the rules. See Bravo/Florida Br. at 16-19. Those exceptions must be rejected.

37. The Bureau considered the applicability of the relevant rules and policies to the MCRSA and fully articulated its determination that the Agreement and participation therein fall within the Commission's clearly established regulatory prohibitions. The exceptors ask the Board to reconsider the very legal conclusions that underpin the HDO, but we must decline that invitation:

> It is "black-letter law" [that] "where there ha[s] been a thorough consideration of the particular question in the designation order," subordinate staff officials such as presiding hearing officials, or even the Board, may not reconsider the matter or take any action inconsistent with the designation order. Atlantic Broadcasting Co., 5 FCC 2d 717, 720-721 (1966). This is so irrespective of whether the designation order is handed down by the full Commission or -- as here -- pursuant to a delegated staff authority acting in the name of the Commission. Frank H. Yemm, 39 RR 2d 1657 (1977).

Fort Collins Telecasters, 103 FCC 2d 978, 983-84 (Rev. Bd. 1986); see also Lion's Share Broadcasting, 8 FCC Rcd 8423, 8423 (Rev. Bd. 1993). Accordingly, we can not reconsider whether the Agreement is violative of the RSA rules or whether the Applicants' participation is tantamount to an improper transfer of interests in pending cellular applications. As will be amplified below, we are similarly constrained to heed the Bureau's instruction to dismiss or deny applications associated with the MCRSA without considering mitigating factors or the imposition of lesser sanctions. See infra paras. 52-57. Correspondingly, we will not address the joint intervenors' assertion that the HDO's designation of the applications for hearing, in lieu of summary dismissal, is erroneous. See AALA Jt. Reply Br. at 32 n.7. We will also forego ruling on exceptions directed at the parties' post-disclosure efforts to rescind the Agreement or the effect of the MCRSA's escape clause as these matters were fully treated and resolved by the Bureau's HDO. See 6 FCC Rcd at 2926, 2931 n.25. The parties are free, however, to raise these exceptions upon further appeal to the Commission. See Western Cities Broadcasting, Inc., 6 FCC Rcd 2325, 2326 (Rev. Bd. 1991) (apellant's claims precluded by HDO are not forever lost; they can be presented to full Commission as part of application for review filed under 47 CFR § 1.115).

38. Finally, as for the arguments that the HDO is an improper policy interpretation of general applicability and that the parties lacked sufficient notice that the rules encompass revenue-sharing schemes, we find that they, too, are directed to reconsideration of the fundamental reasoning underlying the HDO's conclusions and must therefore be deferred in accordance with controlling precedent previously cited. See Algreg Br. at 2; Bravo/Florida Br. at 32-33, 42-43; Signal Br. at 15-16. Suffice it for us to observe that the HDO specifically articulated a reasoned analysis showing how the Agreement and its associated conduct ran afoul of the rules and published policies governing the Commission's RSA process. The United States Court of Appeals for the District of Columbia Circuit, which has exclusive jurisdiction to review all radio licensing cases, see 47 U.S.C. § 402(b), has upheld the Commission's authority to impose strict processing rules such as summary dismissal without opportunity to cure defects, "in order to cope with the flood of applications it receives or expects to receive." JEM Broadcasting Co., Inc. v. FCC, No. 93-1099, slip op. at 15-16 (D.C. Cir. May 6, 1994) quoting Glaser v. FCC, 20 F.3d 1184, 1186 (D.C. Cir. 1994); see also Moving Phones Partnership L.P. v. FCC, 998 F. 2d 1051, 1057 (D.C. Cir. 1993) (47 CFR §§ 22.20 & 22.918 sufficiently alerted appellants that they had to possess the qualifications to be licensees on the day of filing or else be summarily dismissed and that no opportunity would lie to cure non-complying applications), cert. denied, __ U.S. ___, 114 S. Ct. 1369 (1994).

39. Moreover, the parties were specifically forewarned that the RSA rules were designed to "prohibit applicants from holding or acquiring any interest in a competing application where there is no full market settlement." Further Notice of Proposed Rule Making, 1 FCC Rcd at 499 (emphasis added). They therefore knew that the express purpose of the Commission's recent revision of the cellular rules applicable to the RSA applications was to bar practices that skew the lotteries -- specifically including "any arrangement" among fewer than all of the applicants in a market that provides "any reciprocal interest" or "indirect" ownership interest in the applications and "any form of alienation, including option arrangements and agreements, as well as equity and debt placement plans." HDO, 6 FCC Rcd at 2924-25, 2930-31 nn.17-20, citing Third Report and Order, 4 FCC Rcd at 2440, 2443, 2447 n.3; see also Guidance Regarding Questions of Real Party in Interest and Transfers of Control for Cellular Applications in Markets Beyond Top 120, 1 FCC Rcd 3 (Mob.Ser.Div. 1986) (receipt of monies and profits derived from operation of cellular facilities identified as indicia of ownership or control).

40. Significantly, in 1985, before TCC commenced its RSA sales efforts, the Commission announced with respect to the initial cellular lotteries that:

> we will subject to strict scrutiny any applications which appear to contain management agreements with other cellular applicants or otherwise appear to create multiple opportunities for an individual or organization to own, control or manage the cellular licensee in a particular market.
>
> * * *
>
> Accordingly, we emphasize our intent to carefully scrutinize any application which appears to be directed toward skewing the lottery or giving any individual or group control, or the opportunity to obtain control, over more than one mutually exclusive application. We will not allow parties who attempt to circumvent our lottery procedures to obtain a cellular license.

Cellular Radio Lotteries (Recon.), 101 FCC 2d at 587-88 n.26, 600 n.68 (emphasis added). Thus, we find that the Applicants possessed sufficient notice that their collective efforts to minimize the risk of loss in the RSA lotteries placed

their applications in peril of summary dismissal.

41. Sufficiency of the Evidence. Turning their attention to alleged errors in the I.D., the Applicants argue at the outset that the ALJ based his resolution of the designated issues exclusively on evidence that was before the Bureau when it set the case for hearing, and that such evidence is necessarily insufficient to support dismissal or denial of the applications for otherwise no hearing would have been designated. See Cranford Jt. Br. at 2, 15-16; Jaybar Jt. Br. at 6-7. This circular exception is wholly insupportable. As we have already held at para. 37, we may not reevaluate the Bureau's decision to designate the applications for hearing as opposed to selecting some other administrative remedy, for example, a 47 U.S.C. § 403 investigation. Moreover, the I.D., unlike the HDO, was based on the ALJ's review of a massive evidentiary record compiled during lengthy hearing proceedings which included his ruling on 588 exhibits and examination of 57 witnesses. See I.D., ¶ 10; Decision, supra para. 30. Obviously, this wealth of information was not available to the Bureau when it determined that substantial and material questions of fact were outstanding and set the applications for hearing. See 47 U.S.C. § 309(e) (1991) (Commission shall formally designate an application for hearing if a substantial and material question of fact is presented or the Commission is unable for any reason to find that the public interest would be served by a grant); 47 CFR § 22.32(e) (1991) (accord); see, e.g., Pan Pacific Television, Inc., 3 FCC Rcd 6629, 6636 (1988) (where conflicting allegations make resolution of factual matters raised by petitioners impossible, further inquiry at evidentiary hearing is required); see generally Astroline Communications Co. L.P. v. FCC, 857 F.2d 1556, 1561-62 (D.C. Cir. 1988) (discussion of standards for review of petitions to deny). In addition, as Bureau counsel noted, these same factual questions also bear on the qualifications of the party Licensees and are thus germane to the concurrent revocation proceedings. See Oral Arg. Tr. 13326-28. Finally, at oral argument, Bureau counsel observed the irony of the Applicants' protest of the HDO's decision to accord them the full due process rights of an evidentiary hearing whereas the alternative course was summary dismissal of the applications. Id.

42. Participation in MCRSA. Construing the controlling issue of this case to be whether they were "bound" by the MCRSA, the Applicants devote the bulk of their exceptions to contending that the ALJ applied the wrong legal standard in this case and that an analysis and application of the contract and partnership laws of various states (namely: California, Florida, New Jersey, Texas, *and* the District of Columbia) is necessary to resolve the designated issues. See Algreg Br. at 2, 12; Cranford Jt. Br. at 2, 15, 34-35, 47; Jaybar Jt. Br. at 1-2, 39-40, 52-53; Bravo/Florida Br. at 1, 9; Signal Br. at 4, 8. Under this theory, the Applicants strenuously assert that they are not "bound" by the Agreement under applicable state contract law principles because: (1) the MCRSA is void for violating public policy; (2) there was no meeting of the minds; (3) the signers did not read the

MCRSA before executing it; (4) they did not intend to be bound by the MCRSA; (5) the contents of the MCRSA were misrepresented to them; and (6) they justifiably relied on the advice of counsel. See Algreg Br. at 12-15; Cranford Jt. Br. at 34-46; Jaybar Jt. Br. at 39-52; Bravo/Florida Br. at 9-13, 16-27; Alpha Br. at 21; Signal Br. at 7-11.

43. With specific reference to state partnership law defenses, exceptors maintain they are not "bound" by the MCRSA because: (1) the signing partners had no authority to bind the partnerships to the MCRSA; (2) the signing of the Agreement was an activity outside the partnerships' normal course of business; and (3) the signing was not ratified by the partnerships. See Cranford Jt. Br. at 46-57; Jaybar Jt. Br. at 52-63; Bravo/Florida Br. at 13-16; Signal Br. at 11-14. Instead, they allege, the ALJ erroneously "invented his own legal standard" and applied a "one size fits all" analysis in making his determination that all of the Applicants entered into the MCRSA and in resolving the issues adversely to the Applicants. Cranford Jt. Br. at 2; Jaybar Jt. Br. at 2; Bravo/Florida Br. at 7; Signal Br. at 3.

44. These exceptions present an exceedingly narrow view of the proceeding by characterizing it as a mere question of the validity or enforceability of a private contract such that a court of local jurisdiction would decide. By these assertions, the Applicants evince a fundamental misunderstanding both of the issues designated and of the authority of the Commission to enforce its own licensing rules and policies. Rather, the central issue before us is whether the I.D. correctly determined that the Applicants in fact entered into arrangements designed to skew the RSA lotteries in their favor and thereby violated Commission rules and frustrated Commission policies. This inquiry centers not on the technicalities or nuances of the state laws, but on the parties' conduct and the application of Commission rules and policies to the facts at hand. As the Bureau aptly points out, the MCRSA -- the formal version of the revenue-sharing plan earlier agreed on in principle by all of the participants -- is (Bureau Reply at 15):

> the primary, but not the only, evidence of a pattern or practice of conduct by all the applicants and licensees to unfairly skew the cellular lottery process. It is clear from the Agreements that such a result was intended. The focus of this inquiry must remain on the whole scheme, the broad based concerted conduct by all of the parties, to defeat the purpose of the Commission's lottery rules.

45. Specifically, we will address the root of the widespread misconception in the exceptions that the "core issue" set by the HDO is whether the Applicants were "bound" by the MCRSA. See Cranford Jt. Br. at 2, 34, 57, 84; Jaybar Jt. Br. at 1, 5, 39, 52, 63; Bravo/Florida Br. at 1; Signal Br. at 8, 14. The Applicants base their theory on a single phrase culled from the HDO's text: "if it is found that [the Applicants] are bound by the Agreements then their applications should be denied." 6 FCC Rcd at 2928. This then serves as the cornerstone of their argument that the ALJ committed error by not applying a state law analysis to determine whether the Agreement was an enforceable contract. The Applicants' interpretation is not consistent with what the HDO intended, however, as is evident upon reading the pertinent language in context:

> In this proceeding, the only question to be resolved is whether the individual applicants have, in fact, entered into the Agreements or otherwise taken actions which made them parties to the risk sharing provisions. Accordingly, we will specify an issue inquiring into each applicants' actions with regard to these Agreements. In addition, violations of Section 1.65 (failure to report) and 22.923 (false certification) were discussed above. However, if it is concluded with regard to any of the applicants that they never entered into the Agreements then there is no basis to consider those possible rule sections [sic]. On the other hand, if it is found that they are bound by the Agreements then their applications should be denied.

Id. (emphasis added). The thrust of this passage is not whether the Applicants are "legally" bound by state law, as they would have it, but rather whether they meant to and in fact entered into the risk-sharing plan. The "bound by" phrase simply reinforces the point that should the Applicants be found to have "entered into" the Agreement, or "otherwise taken actions" to become parties to the risk-sharing arrangements, then the question of whether they violated other Commission rules is irrelevant because the applications are already subject to dismissal or denial notwithstanding additional violations. The Bureau's choice of words in this isolated instance is not controlling in light of the plain meaning of the balance of the HDO. Furthermore, the operative language of the passage is echoed in the specific issue as designated by the Bureau: "[t]o determine . . . which if any of the applicants entered into the Agreements." Id. (emphasis added).

In accordance with precedent, we are bound by the language of the specified issues read in the context of the HDO's underlying discussion. See SRC, Inc., 11 FCC 2d 537, 539 (Rev. Bd. 1968); Hawaiian Paradise Park Corp., 6 FCC 2d 266, 267 (Rev. Bd. 1967).

46. Another fallacy recurring throughout the Applicants' briefs is the notion that the Commission is constrained to apply the laws of the various states in performing the enforcement of its licensing rules. It is well-established that while the Commission will look to state law, where appropriate, it must ultimately decide cases on the basis of its own federal policies and regulations. As the court has observed with approval: "The Commission has often ignored technicalities of state law in determining if an applicant meets the Commission's policy goals." Marlin Broadcasting of Central Florida, Inc. v. FCC, 952 F.2d 507, 512 (D.C. Cir. 1992), citing Cotton Broadcasting Co., 4 FCC Rcd 1781, 1782 (1989) ("The Commission generally has refused to consider state law when the state law is not relevant to the Commission's policies.") and Signal Ministries, Inc., 104 FCC 2d 1481, 1494 (Rev. Bd. 1986) ("[B]ecause the purposes underlying our comparative policies differ from those of the state in regulating business entities, our analysis is not necessarily complete merely because the organizational structure chosen by the applicant technically complies with the formalities of state law."), rev. denied, 2 FCC Rcd 1259 (1987), aff'd sub nom. Adelphi Broadcasting Corp. v. FCC, 838 F.2d 571 (D.C. Cir. 1988) (Table). While the Commission frequently refers to applicable state law, often to test an applicant's representations as to its ownership structure, such state law provisions may be disregarded where they do not further the Commission's mission of determining whether grant of pending applications would best serve the public interest, convenience, and necessity. Compare Cellwave Telephone Services L.P., 7 FCC Rcd 5955, 5956-58 (1992) (state law analysis applied to determine whether alien principals sufficiently insulated to avoid violation of 47 U.S.C. § 310), recon. denied sub nom. Great Western Cellular Partners, 8 FCC Rcd 3222 (1993), with Richard P. Bott, II, 4 FCC Rcd 4924, 4929 (Rev. Bd. 1989) (ALJ's reliance on state community property law to calculate integration credit reversed; "state law is not determinative in applying [Commission's] integration policies."), rev. denied, 5 FCC Rcd 2508 (1990), aff'd sub nom. Radio Representatives, Inc. v. FCC, 926 F.2d 1215 (D.C. Cir. 1991) (Table), and Bradley, Hand and Triplett, 89 FCC 2d 657, 662-63 (Rev. Bd. 1982) (crediting integration of shareholder who had not paid for stock despite state corporate law to the contrary; state law's definition of a shareholder disregarded as "not relevant to the Commission's integration polices.").

47. In Progressive Cellular III B-3, 6 FCC Rcd 7178 (1991), aff'd, 986 F.2d 546 (D.C. Cir.) (Table), cert. denied, __ U.S. ___, 114 S. Ct. 174 (1993), for example, the court affirmed without opinion the Commission's dismissal of an RSA lottery tentative selectee after learning that two of its general partners were also parties to a mutually exclusive application in a clear violation of Section 22.921. Progressive protested that its partners had not consented to the filing of the competing application, that the managing partner had exceeded the scope of his authority when he included them in that application, and that the managing partner had no authority to bind the partnership absent a vote of its partners. Further, it averred that the Commission staff should have applied state partnership law to determine that the second application filing was *ultra vires* and thus excused the unintended rule violation. 6 FCC Rcd at 7178. Concluding that the staff properly dismissed Progressive's application, the Commission declined to entertain an analysis of defenses rooted in state law. Id. As the Commission's General Counsel later elaborated:

> Progressive's lengthy exposition tells better than anything we could say why the Commission concluded that the public interest requires that nonwireline RSA applicants be strictly held to a simple but demanding standard. With approximately 100,000 MSA applications and 290,000 RSA applications, the Commission cannot possibly devote its scarce resources to the sort of ad hoc analysis demanded here by Progressive, even assuming that it is proper for the Commission to purport to have the requisite expertise to apply Alabama partnership law.

Brief for Appellee at 12, Progressive Cellular III B-3 v. FCC, 986 F.2d 546 (D.C. Cir. 1993). This rationale applies even more forcefully here, where we are faced in this single proceeding with more than a score of implicated applications and a plethora of state jurisdictions. We also note that if Applicants' state law arguments are heeded, applicants similarly situated before the Commission could be disparately treated, depending on the Commission's analysis of differing state laws.

48. In addition, as the Commission has observed on many past occasions, claims based on state law and in the nature of private disputes are better left for resolution in the appropriate judicial fora. See Listeners' Guild, Inc. v. FCC, 813 F.2d 465, 469 (D.C. Cir. 1987) (noting with approval the Commission's "long-standing policy of refusing to adjudicate private contract law questions for which a forum exists in the state courts."); O.D.T. International, 9 FCC Rcd 2575, 2576 (1994) ("the Commission is not the proper forum for resolving contractual disputes . . . and we have consistently indicated that controversies which do not reflect upon the qualifications of a Commission licensee are best left to the local courts for resolution."). The Commission's General Counsel expanded on this point in the briefing of the Progressive appeal (Brief for Appellee at 13):

> The most that can be said for Progressive's ultra vires claim is that it raises difficult, contentious issues under state partnership law that are better resolved in an appropriate judicial forum. If it turns out in that forum that Progressive has indeed been injured by an unauthorized act of the Advanced partnership, a suitable remedy for Progressive's private injury can be fashioned by that court. Meanwhile, the FCC should be allowed to get on with the public's business of licensing a nonwireline cellular service for Nowata, Oklahoma.

Cf. World Communications, Inc. v. FCC, 20 F.3d 472, 476 (D.C. Cir. 1994) (approving Commission's leaving open of private contract issue for the civil courts to resolve). Such recourse presumably remains an option for the subject Applicants and their principals. Thus, we are informed that the individual partners of Centaur, Pinellas, Jaybar, and Bay have filed suit against William Franklin's former firm, Pepper & Corazzini, in the United States District Court for the District of Columbia for damages of in excess of $25 million plus costs and reasonable attorney fees, and that EJM has also filed suit against the firm in the Superior Court for the District of Columbia for damages in excess of $6 million plus costs and reasonable attorney fees. See I.D., n.160.

49. In essence, all Applicants except Alpha have admitted and reported to the Commission that they are parties to the MCRSA. AALA/CFL Exh. 7 (**Algreg**); AALA/CFL Exh. 151(**Cranford**); AALA/CFL Exh. 154 (**New Era**); AALA/CFL Exh. 217 (**Bay**); AALA/CFL Exh. 221 (**Florida**); AALA/CFL Exhs. 119, 125 (**A-1**); Buckhead Exh. 15 (**Bravo**); AALA/CFL Exh. 173 (**Cel-Tel**); AALA/CFL Exh. 199, Buckhead Exh. 23A (**EJM**); AALA/CFL Exh. 187 (**Pinellas**); AALA/CFL Exh. 240 (**Centaur**); and AALA/CFL Exh. 348 (**Signal**). See also Buckhead Exh. 40 (Alpha's letter to Commission denying that it is a party to the Agreement despite inclusion of the signature of its representative on MCRSA disclosed by the other participants). Throughout the hearing, the exceptions, and the oral argument that followed, the parties have continuously sought to distance themselves from that admission, contending, *inter alia*, that they were unfamiliar with the MCRSA's provisions, particularly clauses that set forth certain regulatory and business risks associated with the Agreement, and that they never formally agreed to enter the Agreement as written. These points notwithstanding, it was established on the record that all of the Applicants freely and intentionally agreed to join Neely's risk-sharing program and its essential component of sharing future profits or proceeds with mutually exclusive applicants. See I.D., ¶¶ 264 (Algreg), 117 (Cranford), 139 (New Era), 355-56 (Bay), 332 (Florida), 89 (A-1), 611-13 (Bravo), 664-65, 673-74 (Alpha); 241-42 (Cel-Tel); 410, 412 & n.95 (EJM), 306-08 (Pinellas), 374, 378, 380, 389 (Centaur), 487, 491 (Signal). See also Algreg Br. at 18 (sole proprietor "readily acknowledged having read the MCRSA and having signed it on behalf of Algreg with the intent of being bound by it."); Cranford Jt. Br. at 24 (Cranford, New Era, A-1, and Cel-Tel concede that their partners "signed ballots agreeing to their partnerships' participation in a 'profit-sharing program'"); Jaybar Jt. Br. at 30 ("by their votes, the Jaybar, Pinellas and Bay partners were not voting for the MCRSA, but instead were voting for the 'linkage' or 'link-up' plan explained to them"), id. at 27 (Centaur managing partner acknowledges in newsletter that partners expressed their approval of "business plan as outlined by Greg Neely and Bill Franklin."), id. at 37 (acknowledging that EJM managing partner knew his signature of MCRSA made EJM a party to the risk-sharing agreement); Bravo/Florida Br. at 10 (Bravo managing partner's signature of MCRSA "signified his agreement in principle with the Sharing concept as presented by Franklin"); Florida Exh. 1 at 3-5 (same, with respect to Florida and its managing partner); Signal Br. at 5-6 (partners voted "to contract with additional partnership[s]."). Even Alpha, the only party that has consistently maintained it never joined the MCRSA, concedes that its partners approved and understood the TCC risk-sharing plan. See Alpha Br. at 8 ("Alpha's partners were aware of generally understood and favored the revenue sharing concept as it was explained to them.").

50. We find that it is this conduct -- this acknowledged adoption of an agreement to link their applications in such a way as to skew the RSA lotteries, along with subsequent steps taken towards its implementation -- that violates the Commission's rules and mandates dismissal of the applications. The execution of the MCRSA itself was just another step in furtherance of this unlawful scheme to abuse the Commission's cellular processes. We therefore concur with the I.D. and conclude that the designated issues were properly resolved against the Applicants and that each one of them took actions that made them parties to the risk-sharing provisions of the Agreement, later identified as the MCRSA. As the HDO has already concluded that participation in such Agreement violates Sections 22.33(b)(2), 22.921(b)(1), and 22.922 of the Commission's rules, the applications must be dismissed. See 47 CFR § 22.26(b) (1991) ("Acceptance of an application for filing merely means that it has been the subject of a preliminary review as to completeness. Such acceptance will not preclude the subsequent return or dismissal of the application if it is found to be defective or not in accordance with the Commission's rules."); Cellular Lotteries Further Reconsideration Order, 59 RR 2d at 410 ("the tentative selectee's application will be carefully reviewed to ensure its compliance with the cellular application standards and will be dismissed for failure to [so comply]."); see also, e.g., Progressive, 6 FCC Rcd at 7178-79 (upholding dismissal of application of tentative selectee later found to have violated Section 22.921(b)(1)); Florida Cellular Mobil Communications Corp. 6 FCC Rcd 6910 (1991) (same), recon. denied, 7 FCC Rcd 7856 (1992), appeal pending, No. 92-1664 (D.C. Cir. argued March 29, 1994).

51. The I.D. denied the Applicants' applications due to their multiple rule violations, as well as other perceived failings not discussed herein. See I.D., ¶¶ 27-30 (Concl.). Because our Decision is exclusively based on the Applicants' entering into the risk-sharing agreement and the attendant violations of 47 CFR §§ 22.33, 22.921, and 22.922, and, as the HDO correctly noted, 6 FCC Rcd at 2927-28, 2931 n.34, violation of these rules renders the applications defective and thus requires their dismissal, we conclude the appropriate action here is dismissal of the applications. See REM Communication, 3 FCC Rcd 3705, 3705-06 (1988) (pursuant to 47 CFR § 22.20, defective applications must be dismissed, even if defect is not detected until after acceptance for filing) and authorities discussed above.

52. Mitigation. Even if the I.D. correctly held that they entered the Agreement, the Applicants contend that the ALJ erred in refusing to credit their showings of mitigation. See generally Algreg Br. at 20-24; Cranford Jt. Br. at 63, 73-77; Jaybar Jt. Br. at 69-78. They maintain that they should receive lenient treatment (*i.e.,* lesser sanctions) despite their non-compliance with the Commission's rules because they acted in good faith with no intention of violating the rules and they voluntarily disclosed their participation in the Agreement to the Commission. See Algreg Br. at 4-8; Cranford Jt. Br. at 68, 73-75; Jaybar Jt. Br.

at 75-76; Bravo/Florida Br. at 28-30; Signal Br. at 17-19. Moreover, they continue, they: (1) justifiably relied on the advice of counsel, William Franklin; (2) were unaware of the risk associated with their participation in the MCRSA; (3) were innocent victims of a scam perpetrated by TCC; and (4) were acting reasonably in aggressively pushing the Commission's rules to their limits. See Algreg Br. at 8, 15; Cranford Jt. Br. at 63-73; Jaybar Jt. Br. at 69-75; Bravo/Florida Br. at 19-27, 43-44; Alpha Br. at 1, 4, 9-10, 31 n.30; Signal Br. at 21. These exceptions do not persuade us to reach a different result.

53. As recited in the HDO, 6 FCC Rcd at 2927-28, 2931 n.34, the Commission's cellular processing standards leave no doubt that the consequence of an objective violation of the rules is dismissal of the offending application without opportunity to amend, notwithstanding the applicant's tentative selection by lottery or acceptance for filing. See Cellular Lotteries Further Reconsideration Order, 59 RR 2d at 410; see also, e.g., Chickasaw Telephone Co. for the Benefit of CTC Scholarship Trust, 8 FCC Rcd 600, 601 (1993) ("Being unacceptable for filing, an application may not be amended after the filing date or after the lottery to bring it into compliance with the Commission's Rules."), affirmed, No. 93-1175 (D.C. Cir. May 19, 1994); REM Communication, 3 FCC Rcd at 3705-06 (same). The Commission's strict application of such "hard-nosed" processing rules has been upheld by the Court. See, e.g., Florida Institute of Technology v. FCC, 952 F.2d 549, 550 (D.C.Cir. 1992) (approving Commission's reliance on "hard-nosed" procedural rules to govern filing of mutually exclusive applications for noncommercial educational FM broadcast facilities). It is for this reason that the HDO expressly disallowed consideration of evidence of mitigation or later efforts of rectification in assessing the Applicants' rule violations. See 6 FCC Rcd at 2926-28, 2931 nn.25-26, 34.

54. Two recent cellular decisions confirm the legitimacy of the HDO's hard line position against the consideration of mitigation evidence from the Applicants within the specific regulatory context of this proceeding. In Moving Phones, 998 F.2d 1051 (D.C. Cir. 1993), the Court upheld the Commission's dismissal of tentative selectees that had exceeded the alien ownership restrictions of Section 310, 47 U.S.C. § 310, notwithstanding their efforts to cure the violation because (998 F.2d at 1057):

> The FCC intended the cellular lottery process as a quick, simple method for selecting prospective licensees. See Cellular Lottery Order, 98 F.C.C.2d at 179-82, 219-22; Cellular Lottery Further Reconsideration, 59 Rad.Reg.2d (P & F) at 409. Under these cellular application processing rules and procedures, the

> Commission properly concluded that an application that does not comply with all the rules and requirements, including both procedural and substantive requirements relating to the filing and content of the application, must be dismissed.
>
> The procedures set out by the Commission indicate that compliance was an important element in the FCC's decision to announce a successful applicant as the tentative selectee. See 47 C.F.R. § 22.20(a); Cellular Lottery Order, 98 F.C.C.2d at 195. In amending section 22.918(b) to "strictly limit[] the filing of amendments to applications . . . under lottery selection procedures," id. at 220, the Commission barred amendments throughout the application process, and limited subsequent amendments to those intended to correct minor errors or omissions in otherwise qualified applicants.

55. In Progressive, 6 FCC Rcd 7178 (1991), the Commission rejected out of hand the applicant's arguments directed at mitigating its violation of Section 22.921. Progressive explained that its partners' inclusion in a competing application was without their knowledge or consent and, moreover, was the result of the wrongful actions of a third party. Id. at 7178. Disregarding these assertions, the Commission stated:

> The language of Section 22.921 of the rules is unequivocal in its prohibition against any party holding any interest in two applications for the same RSA market. The Commission offered no exemption for parties who are unwittingly bound by their partners, or for parties whose interests are 'unknowingly colorably in technical violation of Rule 22.921.'

Id. (footnote omitted). The court later affirmed the Commission's ruling by judgment. 986 F.2d 546 (D.C. Cir. 1993).

56. In the analogous case of Florida Cellular Mobil Communications Corp., 7 FCC Rcd 7856 (1992), the Commission upheld the dismissal under Section 22.921 of a tentative selectee whose 0.85% shareholder was also found to hold a 5% interest in a competing application. There, too, the Commission quickly disposed of the applicant's now familiar defenses of inadvertence, ignorance, and lack of consent, stating:

> There is no validity to Florida Cellular's claim that it should not be found in violation of the cross-ownership prohibition because it did not intend to abuse the lottery process. Although deterring speculation is one purpose of Section 22.921, its underlying intent is to assist the Commission in processing applications quickly and efficiently so that service might be available to the public as expeditiously as possible. As the Commission stated in the Order at 6910, para. 5:
>
> ["]A rule such as Section 22.9[2]1 could not be efficiently applied if a fact-specific analysis of intent were required. . . .["]

Id. at 7857. As the Commission's General Counsel later repeated to the Court: "With approximately 290,000 RSA applications to process, the Commission cannot possibly devote its scarce resources to the sort of ad hoc analysis Florida seeks." Brief for Appellee at 15, Florida Cellular Mobil Communications Corp. v. FCC, No. 92-1664 (D.C. Cir. argued March 29, 1994). Indeed, the partnerships counted on just this dilemma to get away with the scheme. See Franklin's advice to MCRSA participants at para. 19 above that Commission staff can not "give a lot of time" to cellular applications because of its heavy volume of workload and tight budgetary constraints.

57. We therefore have no difficulty in heeding the HDO's clear instruction, which appears to us well supported, to summarily dismiss applications associated with the Agreement without considering mitigating factors or the imposition of lesser sanctions. Although, despite the Bureau's direction, the ALJ generously allowed and considered such evidence as part of his efforts "[t]o determine all the facts and circumstances surrounding the applicants' involvement with the Agreements," HDO, 6 FCC Rcd at 2928, he ultimately (and correctly) determined that such evidence was woefully insufficient to excuse the applicants misconduct

or to support sanctions short of dismissal of the applications. See I.D., ¶ 103, ¶¶ 13-15, 25 (Concl.). Finally, because we have determined that the I.D.'s conclusion that the Applicants entered the Agreement is well supported by a preponderance of the substantial record evidence, we find no basis to conclude that the decision was improperly swayed by the ALJ's alleged personal disdain for the Commission's lottery process. See generally Center for Study and Application of Black Economic Development, 7 FCC Rcd 3101, 3102 (Rev. Bd. 1992). Accordingly, the applications will be dismissed without further consideration of mitigation factors.

58. Procedural Matters. We also reject Algreg's exception that it was denied the right to a full hearing by the ALJ's refusal of its request to conduct redirect examination of Neely. See Algreg Br. at 19. The ALJ denied Algreg's request, however, due to counsel's failure to reserve time for redirect at the appropriate juncture as required under the ALJ's hearing procedures. Tr. 2367-68. Algreg has shown no abuse of discretion in this decision nor any prejudice resulting therefrom. See Imagists, 8 FCC Rcd 2763, 2765 (1993) ("We have accorded the ALJs broad authority to regulate the course of multi-party proceedings, permitting them to adopt appropriate procedures to facilitate the prompt performance of their responsibilities."); Cuban-American Limited, 5 FCC Rcd 3781, 3782 (1990) (same) (subsequent history omitted).

59. We are similarly unpersuaded by Algreg's assertion that the ALJ committed prejudicial error by refusing to consider instances in which other "cellular rule violators" were afforded "disparate (and more favorable) treatment." Algreg Br. at 23. Algreg's supporting citation to Ellis Thompson, 3 FCC Rcd 3962 (Mob.Ser.Div. 1988), recon. denied in part, 4 FCC Rcd 2599 (Com.Car.Bur. 1989), an MSA settlement case, is not on point. There the Bureau found that Thompson's amendment was minor, and that no evidence had been presented that "Thompson is unqualified to be a licensee"; however, it did require deletion of a provision in a service agreement which might have allowed another party to interfere with Thompson's business decisions regarding the proposed cellular system. 3 FCC Rcd at 3963-64. Algreg's further reliance on two unpublished public notices, which apparently announced acceptance of amendments containing corrections to ownership information, is also of little use; we acknowledge that the RSA rules permit minor application amendments, such as corrections of a clerical nature. See REM Communications, 3 FCC Rcd at 3705; see also Florida Cellcom, 2 FCC Rcd 1764, 1765 (Mob.Ser.Div. 1987). The defects found in the Applicants' applications are of a manifestly different nature. It is well established that amendments designed to secure an applicant's basic qualifications are not permitted. See Moving Phones, 998 F.2d at 1057. Algreg finally relies on the Mobile Services Division's treatment of former RSA applicant Sunrise Trust, where, following the withdrawal of a petition to deny, it was permitted to reform a guaranty agreement whose provisions were found to "raise questions as to

whether that agreement violates 22.922 of the Commission's rules." Algreg Exh. 24 (rejected). In contrast to that proceeding, the Bureau here has found a clear violation of the rules by any Applicant participating in the MCRSA. In any event, the Sunrise Trust matter was an internal Division ruling of dubious precedential value as it was not published or reviewed by the Commission. Cf. WFPG, Inc., 24 RR 419, 425 (1962) (Initial Decisions which become final without Commission review do not create binding precedent); Salt City Communications, Inc., 8 FCC Rcd 7584, 7585 n.2 (Rev. Bd. 1993) (ALJ's orders not binding precedent). The Applicants' and Intervenors' remaining exceptions are non-decisional and will not be addressed. See Deep South Broadcasting Co. v. FCC, 278 F.2d 264, 266 (D.C. Cir. 1960).

LICENSEES

60. Although the Board has concluded, supra para. 51, that dismissal of the applications is mandatory in light of the specified rule violations, a discrete but related analysis is required with respect to the Licensees, who are in a different legal posture because grant of their applications has become final, See, e.g., Continental Cellular, 6 FCC Rcd 6834, 6840 n.24 (1991), corrected, 6 FCC Rcd 7205 (1991), aff'd sub nom. Moving Phones Partnership LP v. FCC, 998 F.2d 1051 (D.C. Cir. 1993). Unlike the limited issues specified against the Applicants, which focused on whether they entered into the MCRSA, an action that rendered their applications unacceptable for filing under 47 CFR §§ 22.20 and 22.26(b), the issues specified against the Licensees sought to determine the facts and circumstances surrounding their involvement in the MCRSA, and whether the evidence adduced pursuant to that inquiry as well as on the false certification and reporting issues warranted revocation of the licenses.

61. MCRSA Issue. Except for contentions echoing the Applicants arguments premised on state contract and partnership law defenses, which arguments have already been addressed and rejected and need not be considered further, see supra paras. 42-48, the Licensees raise only token arguments that their licenses should not be revoked even if the Licensees are deemed to have been parties to the MCRSA. Thus, they argue, first, that the rules in question are ambiguous and reasonable persons could not have concluded they were entering into an unlawful agreement. Consolidated Exceptions of Pacific, Crystal, Data, North American, and Satellite [hereinafter Pacific Jt. Br.] at 51-62. Those arguments were treated earlier and found lacking. See supra paras. 38-40. Second, the Licensees vigorously challenge the HDO's summary rejection of their attempted rescission of the MCRSA (as too little and too late). Pacific Jt. Br. at 55-57. They argue that they should have been accorded an opportunity to achieve compliance with the Commission's rules in the absence of willfulness to violate the rules, citing 5 U.S.C. § 558(c), and that they in fact tried to come into

compliance by disclosing the MCRSA and taking steps to rescind the MCRSA. As stated earlier, however, exceptions challenging the HDO are beyond the Board's delegated authority. See supra para. 37. Finally, both Alee and Jaybar argue that construction and current operation of their cellular systems should have been accorded greater mitigation weight. Alee Br. at 5; Jaybar Jt. Br. at 94-96. That argument is also without merit. Cf. Chesapeake Broadcasting Corp., 2 FCC Rcd 252 (1987) (compliance at a later date will not mitigate earlier violations); Pass Word, Inc., 76 FCC 2d 465, 516 (1980) (past meritorious performance and public service by station generally insufficient to mitigate adverse inferences where there has been a pattern of deliberate deception), recon denied, 49 RR 2d 1013 (1981).

62. Beyond the exceptors' narrow arguments, we are persuaded by our own independent review of the record evidence that revocation of the licenses is warranted. The ALJ concluded in his I.D. that TCC attempted to circumvent the rules against alliances and partial settlements. He found that "almost all of the partners in each of the [Licensee] partnerships were "fully cognizant of TCC's efforts to implement an RSA 'business plan' that would achieve the same results as the MSA alliances," and that they "willingly participated in that implementation." I.D., ¶ 8 (Concl.). The ALJ added that "an essential link in [TCC's] circumvention plan involved concealing the existence of the MCRSAs from the FCC" and that it was "only [after] pressure from the . . . law firm of Brown, Finn, and Neitert, that [TCC] decided to come clean." Id. ¶¶ 5, 7 (Concl.). It is not necessary to repeat the ALJ's extensive factual findings relative to the individual licensees, but a brief recitation of certain essential key facts demonstrates that his characterization of the Licensees' actions is fully supported by the record.

63. The "prime movers" or individuals responsible for organizing and managing each of the eight Licensees were Allan Kane for Alee (id. ¶ 52); John Dudeck for Jaybar (id. ¶ 273); Tye St. James for Data, Satellite, and Crystal (id. ¶¶ 425, 452, 501); Eric Leong for Pacific and North American (id. ¶¶ 532, 569); and Neil Scott for Alpha (id. ¶ 635). These individuals, in turn, generally chose a relative or family member to be the Licensee's signing partner: Allan Kane for example, chose his son-in-law, Robert Bernstein; John Dudeck of Jaybar named his wife; and Eric Leong recruited his father and wife, respectively, for Pacific and North American. Id. ¶¶ 153, 286, 537, 570. Tye St. James' former MSA associates and a close friend were elected as the signing partners of Data, Satellite and Crystal, and Neil Scott's former MSA client, Mildred Williams, was named as Alpha's co-signatory. Id. ¶¶ 429, 454, 502, 642, 657 & nn.103, 112.

64. Initially, the evidence reveals that each of the managers fully understood that the MCRSA was a highly controversial and dubious mechanism devised to circumvent the Commission's rules prohibiting alliances and to "stack" the lottery odds in the Licensees' favor. They also were aware that the existence of the MCRSA should be kept from public knowledge. All either attended the TCC seminars, in which Franklin described the MCRSA "as something that is, fits around FCC's rules. . . . It's not what they intended to do, it's what they wrote in the rule, and that is the concept we've implemented," or participated in the September 20, 1988 telephone conference call where Franklin reported that the MCRSA was not subject to the Commission's proscription on alliances and partial settlements because of TCC's stratagem of utilizing contractual rights in lieu of ownership interests. Supra paras. 19-20. Franklin made it clear at the seminars that disclosure of the MCRSA would trigger petitions to deny. Tr. 1701-02. Although at oral argument, see oral arg. tr. 13256, and in Jaybar Jt. Br. at 13-14, counsel denied that Franklin ever told investors at the Rockledge, Florida seminar that petitions to deny would be filed if the MCRSA was disclosed, this denial is directly controverted by Neely. Tr. 1701-02. Additionally, there is a reference in the Rockledge transcript where Neely alludes to Franklin's caveats regarding petitions to deny that could attack the applications for participation in the MCRSA. See supra para. 19. Franklin also indicated in the conference call that the Commission would probably not find out about the MCRSA inasmuch as its revelation would require someone to learn about the Agreement and be able to make allegations supported by personal knowledge of the relevant facts, which "people just aren't going to have." See AALA/CFL Exh. 28 at 10-12. In addition to the managers, various partners from Alee and Jaybar attended the Franklin seminars, and partners from Data, Satellite, Crystal, Pacific, and North American participated in the September 20 conference call with Franklin or were informed of its contents. I.D., ¶¶ 155, 284, 437, 460, 506, 544, 577.

65. There is also a plethora of testimony and record correspondence detailing the managers' successful efforts to ensure that the individual partners fully comprehended the linkage concept of the MCRSA -- including actual knowledge that the MCRSA would statistically improve their chances of winning the lotteries -- as well as post-lottery correspondence updating the wins by their linked partners. Id. ¶¶ 155, 159, 164, 284, 288, 434, 459-60, 505-07, 510, 544, 575-76, 649, 653, 657, 676. One of the early marketing letters, in fact, reports that the then-proposed linking plan would have the same effect as joining an alliance. AALA/CFL Exh. 391. Another is from one of the principals expressing concern to Kane as to when his applicant was going to "go formal with a profit sharing agreement." Bureau Exh. 95. The letter goes on to say: "Please bear in mind that the 'linked' concept is what makes the whole operation so successful. Without it the risk would have been unacceptably high for me and probably for many of the others who are in the game. That was the primary theme I addressed in [the] Cranford [seminar]." Id.

66. The record is clear that all of the Licensees discussed, understood, and favored the linkage concept. I.D., ¶¶ 159, 284-85, 434, 459 & n.105, 505, 509, 544, 577, 580, 664-65, 667. For many who had purchased their individual interests early in the hope and based on predictions that the Commission would not eliminate alliances, the MCRSA was the concrete realization of Wilson's original "Business Plan" to replace alliances. Supra para. 11. The Licensees willingly entered into the MCRSA by registering their votes approving participation in the agreement before the initial lottery selections. Supra para. 21. Significantly, Alpha was the sole Licensee and Applicant that failed to acknowledge it ever entered into the MCRSA, see supra para. 49, and originally hinted that the signature of Mildred Williams, its signatory on the MCRSA, had been forged (I.D., ¶ 671). The record establishes, however, that Alpha's principals voted to approve entering the Agreement. See para. 49 above; see also AALA/CFL Exh. 279 (copy of telephonic conversation transcript by Scott to Alpha partners recording their affirmative votes for the MCRSA, including at 4-5 his statement to Williams and her response, "Let's see it is September 19, 1988 and Millie Williams is on the phone with Alpha Cellular and Millie, we need your vote, please either yes or no regarding this Mutual Contingent Risk Sharing Agreement. . . what is your vote please?" Williams: "My vote is yes."); AALA/CFL Exh. 280 at 12 (telephonic transcript between Scott and Williams indicating his intent to go to her home to obtain her authorized signature for MCRSA); I.D., ¶¶ 669, 672. See also I.D., ¶¶ 649-58 reciting Scott's efforts to disseminate TCC's publications and arrange discussions on the linkage scheme to Alpha partners.

67. Finally, there is testimony interspersed throughout the record demonstrating the licensee partnerships' complicity in remaining silent concerning the existence of the MCRSA to outsiders, including the Commission. Kane, for example, warned his Alee partners early on not to divulge any details about the composition or strategy of their partnership even if the caller identified himself or herself as from the Commission, reminding them: "LOOSE LIPS . . . SINK SHIPS." Tr. 6008; Bureau Exh. 24 at 6-7. And, when he was confronted on another occasion by a competitor who had been told by one of the Applicants' principals, W.E. Firehammer, about the linkage arrangement, Kane immediately contacted TCC, which had the managing broker, John Dudeck (also Jaybar's manager), warn Firehammer his statements could endanger all applications linked together, and ask for a letter retracting those statements. Bureau Exh. 147. Although Firehammer acquiesced in Dudeck's request, he quipped in response to the retraction: "I'm surprised, John, by . . . your . . . letter. If what you say is literally true, you had better start circling the wagons when the truth dawns on a bunch of investors given to believe the linkage scenario." Id. Kane subsequently reported to the Alee partnership (and others that he managed) that the MCRSA, "the basic reason for so many of you investing . . . (it reduced the lottery risk while increasing the FCC risk) [has become] almost general knowledge. (Someone shot us all in the foot.)"

Bureau Exh. 107 at 7. He added (id. at 8-9):

> The person who in Florida made an unthinking disclosure to a competitive public company about the Risk Sharing Agreement, shot himself in his own (and ours) foot, because he recently became one of the "winning" RSAs. (Now, he is concerned about the potential damage he has done to himself by forcing the early disclosure and all of the ramifications that we were counting on avoiding.)

68. Neil Scott's correspondence to the Alpha partnership, although more theatrical, connotes the same tenor. He writes (Bureau Exh. 194) :

> CONFIDENTIAL . . . re "sharing" . . . CONFIDENTIAL
>
> To PROTECT YOUR INTERESTS, please DESTROY this portion AFTER UNDERSTANDING IT thoroughly:
>
> One of our fine members has been BLABBING to unauthorized ears about our "sharing concept . . . which is a quick way for all concerned to LOSE! Let's All BUTTON THE LIP about this, as mentioned before.
>
> * * *
>
> We only discuss the "sharing" among OURSELVES period, PLEASE!.
>
> * * *
>
> So let's ALL AGREE, please, that UNTIL YOU START RECEIVING THIS INCOME, NO BLABS.

See also I.D., ¶¶ 284 (Jaybar), 438 (Data), 460 (Satellite), 505 (Crystal), 544 (Pacific), 577 (North American).

69. To the extent that the Licensees attempt to justify their involvement in the MCRSA on the basis of advice of counsel, (in this case, TCC's counsel, William Franklin, see, e.g., Alee Br. at 4, adverting to Section IV. Part D. of Cranford Jt. Br.), the Commission has previously held that counsel is the applicant's agent when appearing before the Commission, and that applicants are therefore bound by counsel's action. See Hillebrand Broadcasting, Inc., 1 FCC Rcd 419, 420 n.6 (1986); see also Carol Sue Bowman, 6 FCC Rcd 4723 (1991), aff'd sub nom. Prater & Durham v. FCC, 983 F.2d 298 (D.C. Cir. 1992); see also para. 82, below. The case cited by exceptors, John K. Mollert, 61 FCC 2d 700, 704 (Rev. Bd. 1976), for the proposition that erroneous legal advice can be weighed in determining whether to revoke a license, is clearly distinguishable and not helpful to exceptors' cause. In Mollert, the Board agreed with an ALJ's determination not to revoke a Citizens Band license where the licensee had violated certain Commission rules, including not making his radio facility (located within his house) available for inspection by authorized Commission representatives. He had relied on erroneous legal advice that the Commission inspectors could not enter his premises without a warrant. The ALJ found that the licensee subsequently realized he had been wrong, had offered to surrender his license on several occasions, was contrite and apologetic, had testified in a forthright manner, and that two of the violations for which he was charged were no longer violations. The Board on review gave significant weight to the licensee's reliance on the erroneous legal advice, and it was in this context that the Board indicated that such reliance can be weighed in determining whether to revoke a license.

70. Here, in contrast to Mollert, the partners were not inexperienced novices unaware of the Commission's prohibition of alliances. Most of them had participated in the earlier MSA lotteries and alliances and fully appreciated both the importance of linkage for increasing the lottery odds in their favor and the risk to their investment if the Commission prohibited alliances. Indeed the linkage scheme might never have come to fruition were it not for the continuous interest and demand of the Licensee and Applicant principals. From the outset, they have had the primary objective of maximizing their chances of obtaining a lucrative cellular facility while eluding the Commission's attempts to eliminate speculation of cellular facilities. This is evidenced, initially, by their presence as cellular participants based on alliances or the so-called Wilson business plan substitute, and, later, by their actions placing family members in multiple partnerships and voting to enter the MCRSA. Moreover, their collective reticence in disclosing the existence of the MCRSA to the Commission or outsiders reflects that the principals of the Licensees (and Applicants as well) were conscious and, indeed, fearful of the risks involved by their participation in the MCRSA. Supra para. 19-20; see also AALA Exh. 198 (Applicant EJM cautioning its partners: "Please remember, our "linked" partnership program is highly confidential and therefore, I urge you not to discuss it with anyone.... Remember do not disclose any

information regarding your interest in other partnerships to anyone."). In Lorain Journal Co. v. FCC, 357 F. 2d at 830, Judge Leventhal, writing for the Court, responded to an argument that businessmen could not be held to a standard of conduct as sophisticated as that which may be reasonably demanded of a lawyer as follows: "[e]ven businessmen are held to high standards of punctilio when they are in positions of joint venture . . . . It does not seem too much to ask that federal licensees be scrupulous in providing complete and meaningful information provided for in forms and regulations."

71. In sum, we are unable to discern on review of the evidence and the exceptions, including a number of non-decisional objections to specific factual findings of the I.D. regarding the individual Licensees, see Pacific Jt. Br. at 7-40, any reason to disturb the ALJ's ultimate factual findings and conclusions. The inevitable consequence of the misconduct here was a torrent of applications inundating the Commission and a skewing of the lotteries that materially prejudiced applicants unwilling to transgress surreptitiously the Commission's cellular rules. The TCC-prepared applications and agreement participants constituted a significant percentage of all applications filed in the RSA lotteries. For example, after the Commission had received application filings in the early rounds of the RSA lotteries, TCC advised its clients that their applications comprised approximately 16% to 18% of the total. AALA/CFL Exh. 23 at 4-7. Even with that high percentage, however, TCC voiced concern that the TCC applications represented only half of the total of what it had originally intended and recommended broader linkage of the eastern partnerships. Id; see also supra para. 18.

72. Finally, as a matter of simple equity, it is difficult to conceive in light of the dismissal of the applications in this proceeding for conduct identical to that engaged in by the Licensees, how anything less than revocation of the licenses could be prescribed inasmuch as it was their deliberate failure to disclose the MCRSA to the Commission prior to grant of their licenses that gave rise to the Licensees' apparent legal advantage. See Petroleum Communications, Inc. v. FCC, No. 92-1670, slip op. at 16-17 (D.C. Cir. May 13, 1994); Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965). Moreover, inconsistent treatment of the Licensee and Applicant groups should not follow merely because of fortuitous timing in the selection of lottery winners. Had the Licensees been selected in the later rounds of the lotteries like their Applicant counterparts, see supra, para. 6, their rule violations would have been revealed upon Commission receipt of the amendments prior to the issuance of the construction permits, and the Licensees would then have been identically situated to the Applicants. Section 312(a)(2) of the Communications Act, as amended, 47 U.S.C. § 312(a)(2), provides that the Commission may revoke any station license or construction permit "because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application." Because the

applications were defective due to specific rule violations, and would not have been granted if the MCRSA had been timely disclosed, Section 312(a)(2) is wholly applicable here with respect to the Licensees.

73. Procedural Arguments. The remaining exceptions to the MCRSA inquiry are procedural in nature, and while requiring some comment, do not dictate a contrary result. Specifically, certain of the Licensees challenge the ALJ's interlocutory ruling (Memorandum Opinion and Order, 91M-2568, released August 19, 1991) denying their joint motion to modify his Prehearing Order to: (1) direct the Bureau to exchange its direct case exhibits in advance of the Licensees' exchange and proceed first with the presentation of evidence; and (2) prohibit the participation of the adverse parties or intervenors in the revocation phase of the proceeding. Pacific Jt. Br. at 62-69. They argue that the simultaneous exchange of direct case exhibits effectively shifted the burden of proceeding onto the Licensees by requiring them to formulate a direct case prior to knowing the scope of the Bureau's case. They further argue that participation by the intervenors against the Licensees was unlawful, asserting that the Commission does not recognize petitions to revoke and that Section 312 does not provide for interested parties to participate in revocation proceedings. The exceptors add that such participation by these "private co-prosecutors" constituted an improper *ipso facto* delegation of duties to the intervenors that properly lies with the Common Carrier Bureau. For its part, Alpha contends that the ALJ erroneously asserted that the ultimate burden of proof was on the individual licensees citing to para. 7 of the I.D. Alpha Br. at 30-31.

74. Save for Alpha's exception concerning the burden of proof, with which we agree the procedural exceptions are without merit. At the outset, we fail to discern how the ALJ's requirement for the simultaneous exchange of direct case exhibits effectively shifted the burden of proceeding onto the Licensees. Both the initial burden of proceeding and the ultimate burden of proof were placed on the Bureau by operation of law, see 47 U.S.C.§ 312, and the Licensees did not even need to make an affirmative showing. The Licensees suffered no prejudice by having to prepare their cases at the same time as all of the other parties. Moreover, the ALJ, who is vested with plenary authority to regulate the course of the hearing, 47 CFR §1.243, assured the parties that his procedures would be adequate and fair and informed them that he would set down an order of presentation whereby the Bureau and intervenors would present their evidence ahead of the Licensees. Memorandum Opinion and Order, FCC 91M-2568 at n.1. Exceptors do not allege that the ALJ did otherwise.

75. As for the exceptors' request to the ALJ to confine the intervenors' participation to the Applicants only, the short answer is that the ALJ had no authority to grant such relief because the HDO accorded the intervenors full party status. See Atlantic Broadcasting, Co., 5 FCC 2d at 720 (subordinate officials lack authority to ignore or modify designation order where disputed matter addressed). Even assuming, however, that the HDO did not directly address the question of limiting the intervenors' participation, the exceptors' argument that such participation is unlawful here, citing precedent that the Commission does not recognize motions to revoke, is a *non sequitur*. Nothing in Puerto Rican Media Action and Educational Council, Inc., 51 FCC 2d 1178, 1179 (1975), cited by the exceptors, or in Section 312 of the Act, establishes the proposition that intervention by third parties is impermissible in revocation cases; and, in practice, the Commission has permitted party status to third parties in revocation proceedings. See, e.g., Blue Ribbon Broadcasting, Inc., 90 FCC 2d 1023, 1024 ¶ 3 (Rev. Bd. 1982); Pass Word, Inc. et al., 61 FCC 2d 410 (1976); see generally Administrative Procedure Act, 5 U.S.C. § 554 (b) (allowing for private parties as moving parties in adjudications). The exceptors' attempts to distinguish those cases are non-persuasive. Moreover, during the Bureau's lengthy investigation of the entities identified with the MCRSA and throughout this proceeding, the intervenors raised substantial questions of law and fact relating equally to the Applicants and the Licensees. These special circumstances established that their participation would be of assistance to the Commission in the determination of the issues in question. Algreg, supra, 6 FCC Rcd at 5300 ¶ 8.

76. Finally, we reject as hyperbole exceptors' claim that there was an improper delegation of the Bureau's duties to the intervenors and abdication of the Bureau's role in prosecuting the case. The Bureau accurately responds that it "filed requests for admissions against these licensees, . . . participated in depositions, . . . requested documents from the licensees, . . . filed its own motions to compel, . . . filed its own Motion to Enlarge the issues, . . . cross-examined witnesses, . . . called witnesses, . . . went forward first concerning all licensees, and . . . filed its own Proposed Findings of Fact and Conclusions of law." Bureau Reply at 136. Alpha is correct that the ALJ erred in asserting that the burden of proof was on the licensees, see 47 U.S.C. § 312(d), but that assertion had no decisional impact on the case ultimately because the total evidence adduced reflects overwhelmingly that the Bureau met its burden.

77. Secondary Issues: False Certification and Section 1.65. Virtually all of the Licensees except to the ALJ's conclusions that his findings under the false certification and Section 1.65 issues provide an independent basis for revocation of the licenses. We agree that the evidence should not provide a separate basis for revocation of the licenses. In the first place, the Licensees correctly argue they could not have falsely certified their captioned applications because each was signed and the respective certifications executed prior to their execution on the

MCRSA. The ALJ had reasoned that it was sufficient the Licensees knew they were about to become participants in the MCRSA; however, he cited no precedent, nor are we aware of any, that a certification, accurate when executed, may serve as grounds for revocation of a license. But see Edward W. St. John, 5 FCC Rcd 1192, 1193 (1990) ("[Q]uestions should be answered accurately as of the date of signing, as indicated by the certifications."). Additionally, it appears that the ALJ expanded the reach of the framed certification issue to include purported failures by the Licensees' signing partners to have "complete" applications before them at the moment of certification. There is no indication in the text of the HDO that the requisite inquiry extended beyond the Commission's immediate concern over the MCRSA and the ALJ specifically denied a subsequent request for an additional hearing issue to examine whether the Licensees violated Commission rules by failing to have every part of the application before them when certifying. See Memorandum Opinion and Order, FCC 91M-3316, released November 22, 1991.

78. Secondly, concerning the Section 1.65 reporting issue, the Licensees concede they did not report the existence of the MCRSA within thirty days of the public notice announcing their respective selections in the lottery (on counsel's advice). This establishes a *prima facie* Section 1.65 violation by all of the Licensees in light of the HDO's finding that entering the MCRSA was a reportable event. The reporting omission and underlying circumstances, however, more appropriately belong within the context of the overall consideration of the Licensees' participation in the MCRSA, and, indeed, have been taken into full account in arriving at the determination to revoke the licenses. The HDO's conclusional issue concerning the Licensees sought to determine whether the licenses should be revoked on the "totality" of the evidence adduced on the issues pertaining to the MCRSA; and on this query, both the ALJ and the Board have answered in the affirmative. That is sufficient without separately assessing the impact of the failure to report standing alone. One additional comment is warranted. Section 1.65 amendments for RSA cellular applications in markets below the top-90, as here, are not permitted prior to conduct of the lottery for the market applied for, and then only by the tentative selectee within thirty days of the public notice announcing the lottery results. See 47 CFR § 22.918(b)(1991). To the extent the ALJ faulted the Licensees for not disclosing the MCRSA within thirty days of when they entered the Agreement, this was error. See Continental Cellular, 6 FCC Rcd at 6839 nn. 17-18 (noting differences in processing procedures between broadcast and cellular applications).

79. Alien Ownership and Related Lack of Candor Issues. Alee also excepts to the ALJ's revocation of its license under the related alien ownership and lack of candor issues. Alee particularly objects to the ALJ's candor finding (I.D., ¶ 188) that it deliberately filed an erroneous Section 1.65 amendment (on January 9, 1989) listing Shafi Sharifan as an Alee partner and a United States citizen, after learning that Sharifan was an alien and that he had purportedly been replaced as an Alee partner by his brother-in-law, Amir Riahi-Shiraz, a United States citizen. Alee Br. at 7-15. The "retention" of Sharifan was at Franklin's suggestion that substitution of Sharifan in the captioned application with Riahi-Shiraz would raise questions if the application's original ownership list was compared with its amendment. Riahi-Shiraz was listed as a partner in Alee's applications filed in later lottery tiers. Alee claims, however, that it was informed by William Franklin, its attorney, and Allan Kane, its manager, only that an unidentified alien had been mistakenly included in the partnership and that the problem had been corrected by removal of the alien. Alee argues the ALJ was particularly unwarranted in equating what Alee and its partners knew about the Sharifan situation with what TCC's representatives (Franklin, Kane, and others) knew about it. It asserts there was no intent to deceive by the partnership. Alee Br. at n.22. Additionally, if the Board should find that the Sharifan-Riahi assignment violated the Commission's rules, Alee argues that revocation is not warranted because its actions were taken on advice of counsel and voluntarily reported when it obtained new counsel. Id. at 19-21. Finally, Alee contends that the alien ownership restrictions of 47 U.S.C. § 310(b) of the Communications Act and Section 22.4 of the Commission's Rules govern only the grant, not the filing, of applications with alien ownership and that the narrow alien issue as framed (*i.e.*, whether it complied with the Act and Commission Rule) must be resolved in its favor because Sharifan had been removed by the time the application grant became final. Id. at 21-25.

80. We will affirm the ALJ's conclusion on the alien ownership issue and not reach the candor issue. Alee is incorrect that Section 310 of the Act or Section 22.4 of the Commission's Rules implicitly permits the filing of an application with foreign ownership or that the alien ownership issue must be resolved in its favor. The Commission rejected an identical contention in Continental Cellular, 6 FCC Rcd at 6835, where it stated:

> The language of the alien ownership provision cannot reasonably be read to mean that a noncomplying application can be filed. This fact is particularly true given [that] Question 12 on FCC Form 401 for a Common Carrier radio station authorization asks applicants to certify compliance with the statute's alien ownership restrictions. It cannot be reasonably argued, therefore,

> that an alien cellular applicant can assume it can file a non-grantable application and fix it later.

In upholding the staff action dismissing the application as defective for failure to comply with the alien ownership restrictions, the Commission added: "under our cellular processing standards, any application containing a defect, such as violation of the alien ownership restrictions, is dismissed without opportunity to cure." Id. Alee's application would similarly have been dismissed as defective had it timely disclosed Sharifan's alien status. See also HDO, 6 FCC Rcd at 2931 n.24 noting that Alee's "application should not have been granted."

81. Alee's reliance on language in Continental, 6 FCC Rcd at 6840 n.24 for the proposition that its license should not be revoked because its grant is now final, is misplaced. The Continental note pertained to GTRW Partnership, 2 FCC Rcd 4160 (Mob.Ser.Div. 1987), where the Commission staff had improvidently accepted an amendment allowing the applicant to remove an alien general partner prior to grant. The Commission subsequently concluded in Continental that, although the GTRW application should have been returned as defective and any corrective amendment denied, it would not take any action on the original GTRW license or its successors in interest because the grant was final. Here, the case is far different. Sharifan was a partner at the time of the grant of Alee's application, and Alee, or its agents, deliberately concealed Sharifan's alien status from the Commission. Alee's August 12, 1988 application listed him as a partner and no amendment reporting his departure was filed prior to grant. I.D., ¶¶ 151, 171. Sharifan also continued to attend partnership meetings, signed partnership documents (including one to rescind the MCRSA), voted on partnership matters, and made capital contributions. Id., ¶¶ 189-90, 193. As for the "cover-up," Kane, Alee's manager, and Franklin, its attorney, telephonically conversed on the eve of the December 19, 1988 partnership meeting concerning the alien problem, where Franklin, according to Kane, "said in effect, [Sharifan's] name has already been submitted [on the application], there's little that you can do, the risk is there, let sleeping dogs lie. Forget it. . . . Don't rock the boat." Tr. 3457. Additionally, Franklin testified that he spoke at the meeting by speakerphone and offered alternative courses of action to the partnership, including that the partnership continue to rely on Sharifan's original questionnaire which indicated that he is a United States citizen. I.D., ¶ 185. Kane also testified that he disclosed the alien problem to the partnership. Tr. 3468. And, in a letter dated December 28, 1988, from Franklin to Alee's signing partner, Robert Bernstein, which Bernstein claims not to have seen (Tr. 5913), enclosing a Section 1.65 amendment for the captioned application, Franklin wrote (Bureau Exh. 10):

> Per the partnership's decision at its December 19 meeting, we have retained

> Mr. Sharifan's identification as an Alee partner. In so doing, we are relying on the information he initially provided to Alee as to citizenship. As the partnership discussed, this approach creates the risk of dismissal for subsequent applications if this application and its amendment were compared against subsequent applications. However, as the partnership discussed, on balance this alternative minimizes risk to Alee.

82. Even were we to accept Alee's claim that the partners were informed only that the partnership had had an alien problem that was now corrected and that it lacked an intent to deceive the Commission, the Licensee would still not escape the adverse consequences of its alien ownership by reliance solely on the actions of its manager and attorney. See Decision supra para. 69. In any event, a licensee may not delegate its responsibility to comply with the Commission's rules. See, e.g., MTD, Inc., 6 FCC Rcd 34 (1991); see also CHM Broadcasting Limited Partnership v. FCC, No. 92-1263, slip op. at 14 (D.C. Cir. June 14, 1994) (rejecting argument that Commission has attributed an agent's actions to the applicant only "in cases of aggravated circumstances of repeated failures by the lawyer or engineer and those failures are known to the applicant").

83. Abuse of Process Issue: Forfeiture. Pacific, Crystal, North American, and Satellite except to the ALJ's addition of the abuse of process issue directed against them for purportedly failing to timely comply with discovery requests, and his assessments of $25,000 forfeitures against them. Pacific Jt. Br. at 70-76. They contend that the ALJ cited no case or specific rule to support his authority to assess such forfeitures, but apparently premised his actions on the Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 FCC Rcd 157 (1990), which, exceptors argue, is not applicable because the procedures adopted there relate to applicants for new broadcast facilities only. Pacific Jt. Br. at 74-76. They assert that ALJs lack summary contempt powers and cannot fine attorneys or witnesses for misconduct, although they readily acknowledge attorney misconduct may be referred to the Commission under 47 CFR § 1.24 for investigation and action. Id. at 76. The exceptors further argue that, in any event, there is no record evidence that they deliberately withheld documents or stonewalled legitimate discovery requests. Id. at 11.

84. The Board need not reach the question of the ALJs' purported exercise of summary contempt powers because the record evidence fails to establish that the licensees "stonewalled" valid discovery requests. A close examination of the record transcript citations contained in the I.D. reflects that the witnesses apparently complied with directives by their attorney to search for documents responsive to requested categories, and that the subsequently produced documents were a result of the ALJ's expansion of the scope of permissible discovery of requested documents. Tr. 8560-61, 8861-63, 10346-47. For example, in noting the difference between what he believed was the relevant scope of documents and what had been requested previously, the ALJ said: "Well, in fairness though, I -- I had the benefit of hindsight. I can go back and look at what was actually in the record." Tr. 10347. While it is unclear from the disparities in documents produced by different licensees whether all of the licensees were equally diligent in ferreting out relevant materials, there is no substantial evidence that the foregoing licensees deliberately withheld documents or engaged in obstructionist tactics, nor were any documents identified that the licensees had that were not produced.

85. Miscellaneous. Finally, Alee disputes the ALJ's findings on a purported abdication of control and impermissible transfer of ownership where pertinent issues were never specified against it, see I.D., ¶ 198, n.55, and Data and Satellite label remarks by the ALJ, id. ¶¶ 449-50, 478-80, ¶ 30 (Concl.), on alleged *ex parte* presentations by them as "gratuitous." The Board will grant these exceptions. No issues were specified on these matters, see generally Silver Star Communications-Albany, Inc., 3 FCC Rcd 6342, 6349-6350 (Rev. Bd. 1988), modified on other grounds, 6 FCC Rcd 6905 (1991), and in light of our disposition revoking the licenses, further administrative action is unnecessary.

86. Summation. All exceptions having decisional significance have been considered by the Board. The applications have been dismissed as unacceptable for filing for failing to comply with the Commission's Rules. Additionally, we have revoked all of the licenses based on the totality of the evidence adduced concerning the Licensees' involvement in the impermissible Agreement. Resolution of the alien ownership issue provides a second basis for revoking Alee's license. The forfeitures imposed against four of the Licensees under the abuse of process issue have been cancelled. We close by incorporating the following statement which the late Board Member Blumenthal requested be included in our Decision (during discussions of this case following oral argument): "It would be paradoxical or ironic if we were to grant any of these applications; the promoters would be proven wholly correct and a gross miscarriage of justice would result."

87. ACCORDINGLY, IT IS ORDERED, That the unopposed petitions for leave to amend filed by Cranford Cellular Communications on February 5, 1993; New Era Tele-Communications on February 10, April 28, and June 29, 1993; A-1 Cellular Communications on March 24, 1993; Alpha Cellular on June 10, 1994; Cel-Tel Communications on February 9, 1993, and March 15, 1994; EJM Cellular Partners on February 5 and October 26, 1993; Pinellas Communications on February 8 and April 20, 1993; and Centaur Partnership on May 6, 1993, ARE GRANTED, and the corresponding amendments ARE ACCEPTED.

88. IT IS FURTHER ORDERED, That the motions to strike filed, respectively, by Algreg Cellular Engineering on April 30, 1993 (two motions); Cranford Cellular Communications, *et al.*, on April 26, 1993; Bravo Cellular and Florida Cellular on April 30, 1993; Alpha Cellular on March 22 and April 28, 1993 (two motions); and Cellular Pacific, *et al.*, on April 29, 1993, ARE DENIED; that the motion to compel filed by Bravo Cellular and Florida Cellular on May 20, 1993, IS DENIED, and that their request for ruling filed on September 17, 1993, IS DISMISSED as moot; that the request for leave to file supplement to exceptions filed by Alee Cellular Communications on October 12, 1993, IS DENIED and the supplemental exceptions ARE STRICKEN; that the motion for leave to exceed page limitations filed by Alpha Cellular on March 11, 1993, IS GRANTED; and that the motion to strike filed by Applicants Against Lottery Abuses on December 23, 1993, IS GRANTED, and the letter filed by Cranford Cellular Communications, *et al.*, on December 14, 1993, IS STRICKEN.

89. IT IS FURTHER ORDERED, That the forfeiture penalties assessed against Satellite Cellular Systems, Cellular Pacific, North American Cellular, and Crystal Communications Systems ARE CANCELLED.

90. IT IS FURTHER ORDERED, That the applications of Algreg Cellular Engineering for Market 307 (Alabama 1 - Franklin) (File No. 10607-CL-P-307-A-89); Cranford Cellular Communications for Market 311 (Alabama 5 - Cleburne) (File No. 10611-CL-P-311-A-89); New Era Cellular Tele-Communications for Market 332 (Arkansas 9 - Polk) (File No. 10563-CL-P-332-A-89); Bay Cellular of Florida for Market 497 (Mississippi 5 - Washington) (File No. 10754-CL-P-497-A-89); Florida Cellular for Market 505 (Missouri 2 - Harrison) (File No. 10445-CL-P-505-A-89); A-1 Cellular Communications for Markets 514 (Missouri 11 - Moniteau) and 661 (Texas 10 - Navarro) (File Nos. 10454-CL-P-514-A-89 and 10409-CL-P-661-A-89); Bravo Cellular for Market 579 (North Carolina 15 - Cabarrus) (File No. 10673-CL-P-579-A-89); Alpha Cellular for Market 586 (Ohio 2 - Sandusky) (File No. 10909-CL-P-586-A-89); Cel-Tel Communications for Market 589 (Ohio 5 - Hancock) (File No. 10912-CL-P-589-A-89); EJM Cellular Partners for Markets 596 (Oklahoma 1 - Cimarron) and 721 (Wyoming 4 - Niobrara) (File Nos. 10567-CL-P-596-A-89 and 10116-CL-P-721-A-89); Pinellas Communications for Market 613 (Pennsylvania 2 - McKean) (File No. 10808-CL-P-613-A-89); Centaur Partnership

for Market 631 (South Carolina 7 - Calhoun) (File No. 10720-CL-P-631-A-89); and Signal Cellular Communications for Market 632 (South Carolina 8 - Hampton) (File No. 10721-CL-P-632-A-89) ARE DISMISSED.

91. IT IS FURTHER ORDERED, That the licenses of Satellite Cellular Systems, Station KNKN 268, for Market 318 (Arizona 1 - Mohave) (File No. 10037-CL-P-318-A-89); Jaybar Communications, Station KNKN 251, for Market 323 (Arizona 6 - Graham) (File No. 10042-CL-P-323-A-88); Data Cellular Systems, Station KNKN 250, for Market 345 (California 10 - Sierra) (File No. 10029-CL-P-345-A-88); Cellular Pacific, Station KNKN 252, for Market 346 (California 11 - El Dorado) (File No. 10031-CL-P-346-A-88); North American Cellular, Station KNKN 253, for Market 388 (Idaho 1 - Boundary) (File No. 10066-CL-P-388-A-88); Alpha Cellular, Station KNKN 340, for Market 410 (Indiana 8 - Brown) (File No. 10318-CL-P-410-A-88); Alee Cellular Communications, Station KNKN 271, for Market 555 (New Mexico 3 - Catron) (File No. 10074 CL-P-555-A-88); and Crystal Communications Systems, Station KNKN 309, for Market 606 (Oregon 1 - Clatsop) (File No. 10078-CL-P-606-A-88) ARE REVOKED.

92. IT IS FURTHER ORDERED, That the application of Data Cellular Systems for modification of facilities (File No. 07080-CL-MP-91); the applications of Cellular Pacific for modification of facilities (File Nos. 06606-CL-MP-90 and 06688-CL-MP-90); and the application of Alpha Cellular for assignment of Station KNKN 340 (File No. 04924-CL-AL-1-90) ARE DISMISSED as moot.

93. IT IS FURTHER ORDERED, That Satellite Cellular Systems, Jaybar Communications, Data Cellular Systems, Cellular Pacific, North American Cellular, Alpha Cellular, Alee Cellular Communications, and Crystal Communications Systems ARE AUTHORIZED to continue to operate Stations KNKN 268, KNKN 251, KNKN 250, KNKN 252, KNKN 253, KNKN 340, KNKN 271, and KNKN 309, respectively, until 12:01 a.m., September 6, 1994, to enable the licensees to conclude station affairs; PROVIDED, HOWEVER, that if the licensees seek review of our Decision, they are authorized to continue to operate the named stations until final disposition of such appeal.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino

Joseph A. Marino
Chairman, Review Board

STATEMENT
of
BOARD MEMBER MARJORIE REED GREENE

In spite of the complexity from the large number of parties here, this is a straightforward case. Each of the Applicants and Licensees here entered into an agreement intended to reduce risk and increase chances of profit by sharing the good luck of cellular RSA lottery winners. For the eastern applicants, the scheme involved multiple applications in *every* RSA market; for the western applicants, most markets. The Applicants and Licensees knew of the Commission's intention to eliminate incentives for speculation by eliminating reciprocal interests in multiple competing applications -- their representatives attended seminars and/or participated in conference calls addressing this very point -- but the partners and owners voted to join in the MCRSA anyhow. And, they wanted to keep it quiet.

Their explanation when the scheme fell apart? They're not accountable: TCC's attorney didn't tell them not to do it; the contracts don't really count by operation of state contract law if the Commission disapproves them; they didn't mean for things to turn out this way; and, from the Licensees, a variation on the overwhelmed Commission theme they listened to at the outset, namely, the Commission's staff should have prosecuted the issues by itself, without participation by third parties.

But, the facts in this case speak for themselves, and the Applicants and Licensees -- all of them -- are accountable for their participation in the MCRSA. Their disappearing contract argument may be cognizable in a state court contract action, but it offers no escape from the consequences of their conduct in entering such an agreement before the Commission. If it did, no one entering into a contract in violation of Commission rules would be accountable for his actions. What then would be the incentive for compliance?

Finally, the integrity of the Commission's processes depends on an honor system. When that breaks down as it did here with the assurances that the Commission lacks the resources to care, *see Decision* para. 19, those who disdain the system are subject to the prescribed enforcement actions; in this case, the dismissal of applications that failed to comply with the rules and the revocation of licenses that would not have been granted had the MCRSA been disclosed.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

CC Docket No. 91-141

In the Matter of
Expanded Interconnection with
Local Telephone Company Facilities

MEMORANDUM OPINION AND ORDER

Adopted: July 14, 1994 Released: July 25, 1994

By the Commission: Commissioners Quello, Barrett, and Chong issuing separate statements.

Table of Contents

Paragraph No.

I. INTRODUCTION 1
A. Summary 1
B. Background 5

II. PUBLIC POLICY ANALYSIS 7

III. INTERCONNECTION ARCHITECTURE 13
A. Physical and Virtual Collocation 13
B. Locations Where Expanded Interconnection Must Be Made Available 38

IV. STANDARDS 40
A. Standards Governing Virtual Collocation 41
1. In General 41
2. Equipment Designation 47
3. Installation, Maintenance, and Repair 54
4. Other Requirements for Virtual Collocation 63
B. Standards Governing Physical Collocation 67
1. Space Allocation and Exhaustion 67
2. Tariffing Requirements for Physical Collocation 73
C. Standards that Apply to Both Virtual Collocation and Physical Collocation 74
1. State Expanded Interconnection Policies 74
2. Reporting Requirements 76
3. Dispute Resolution 80
4. Interconnection to LEC Facilities 82
a. Microwave 82
b. Copper or Coaxial Cable 85
c. DS0 and Other Special Access Services 89
5. Other Standards Issues 94

V. AVAILABILITY OF EXPANDED INTERCONNECTION 102
A. Parties that Offer Expanded Interconnection: Reciprocity 102
B. Parties that May Use Expanded Interconnection 106
1. Restrictions on AT&T 107
2. Restrictions on End Users 111

VI. EXPANDED INTERCONNECTION RATE STRUCTURE AND PRICING 112
A. Connection Charge Rate Structure 112
B. Connection Charge Pricing 118
C. Contribution Charge 130
D. Separations 134

VII. LEC PRICING FLEXIBILITY 138
A. In General 138
B. Density Zone Pricing 149
1. Threshold Required for Implementation 149
2. Price Cap Structure 157
3. Definition of Zones 164
B. Volume and Term Discounts 168
1. Special Access 168
2. Switched Transport 172
a. In General 172
b. Threshold Required for Implementation 177

c. Application of New Service Test to Discounts 186
D. Other Forms of Pricing Flexibility 193
E. Fresh Look 197
F. Non-Recurring Reconfiguration Charges 209

VIII. OTHER MATTERS 213

IX. CONCLUSION 215

X. ORDERING CLAUSES 216

APPENDIX A: Petitions for Reconsideration, Oppositions, and Replies Filed

APPENDIX B: Rule Changes

I. INTRODUCTION

A. Summary

1. In a series of orders in the past two years, we have adopted and implemented an expanded interconnection policy that creates new opportunities for the competitive provision of access services that the local telephone companies traditionally have provided on a monopoly basis.[1] Our decisions mandating expanded interconnection and collocation are fundamental to opening the interstate special access and switched transport markets to greater competition. Our simultaneous grant of greater pricing flexibility to the local telephone companies enables those companies to compete more vigorously as well, while assuring that we retain necessary controls on dominant access providers. We believe that expanded interconnection, by fostering increased competition in interstate access markets, should increase economic growth. Competition should lead to lower special access and switched transport charges,[2] which in turn will make it possible for long-distance companies to offer service at lower rates, thus stimulating demand for communications services. Lower prices for communications services not only benefit consumers directly, they also make resources available for productive investment elsewhere in the economy. Competition also gives local telephone companies, as well as their competitors and customers, incentives to invest in advanced telecommunications technologies, develop innovative services, and provide existing services more efficiently. Expanded interconnection creates greater opportunities for new entrants to compete by enabling them to rely in part on the telecommunications facilities of established service providers, and thereby promotes broader access to communications networks and services by all users. The competition that expanded interconnection makes possible should give users a greater range of choices in telecommunications services and increase opportunities for users to obtain redundant facilities, thus contributing to network reliability.

2. On June 10, 1994, the U.S. Court of Appeals for the District of Columbia Circuit issued an order stating that it would vacate in part the first two of our expanded interconnection orders on the grounds that the Commission does not have authority under the Communications Act of 1934, as amended, to require local exchange carriers (LECs) to provide expanded interconnection through physical collocation.[3] The court held that Section 201 of the Act, which authorizes the Commission to order carriers "to establish physical connections with other carriers," does not empower the Commission "to grant third parties a license to exclusive physical occupation of a section of the LECs' central offices."[4] Underlying the court's statutory construction was its concern that our physical collocation requirement constituted a "taking" of property.[5] The court also stated that it would remand

---

[1] See infra notes 11-13.

[2] Interstate access is a service traditionally provided by local telephone companies that enables interexchange carriers and other customers to originate and terminate interstate telephone traffic. Special access is a form of interstate access that uses dedicated transmission lines between two points, without switching the traffic on those lines. Switched transport is another form of interstate access comprising the transmission of traffic between interexchange carriers' (or other customers') points of presence and local telephone companies' end offices, where the traffic is switched and routed to end users.

[3] Bell Atlantic Telephone Companies v. FCC, No. 92-1619, 1994 WL 247134 (D.C. Cir., June 10, 1994) (Bell Atlantic v. FCC). For definitions of "expanded interconnection," "physical collocation," and "virtual collocation," see ¶ 7 infra.

[4] Id., slip op. at 9.

[5] Id.

our orders to permit us to consider whether and to what extent to impose virtual collocation requirements in the absence of a physical collocation requirement. Finally, the court stated that it would remand the question of whether we would impose a "fresh look" requirement in the absence of mandatory physical collocation. The court stated that "[t]he orders are vacated insofar as they require physical collocation; in all other respects the orders are remanded to the Commission for further proceedings."[6]

3. We are acting expeditiously to preserve the substantial public interest benefits of expanded interconnection. We here establish the rights and obligations of affected parties under a modified expanded interconnection regime that takes the court's decision into account. By responding quickly to the court's decision, our goal is to ensure uninterrupted availability of expanded interconnection services. We seek to avoid the disruption to competition that would result if new rules and tariffs implementing our expanded interconnection policy are not in place at the time the court's decision takes effect. Thus, even though the court's mandate has not yet issued,[7] and even though the court's decision applies only to expanded interconnection for special access, we adopt in this order rules designed to speed the process so as to ensure that local telephone companies offer expanded interconnection for both special access and switched transport through generally available virtual collocation services no later than December 15, 1994. We will exempt from this requirement companies that choose instead to offer physical collocation subject to the standards we set forth below. Under this order, the LECs are required to file tariffs implementing our new mandatory virtual collocation policy on September 1, 1994; in other respects, the rules and regulations adopted here will become effective on December 15, 1994. December 15 is the earliest date by which we can ensure that the new tariffs will have undergone adequate review by the Commission's staff. To prevent any lapse in the effectiveness of our overall expanded interconnection policy, we intend to seek a stay of the issuance of the court of appeals' mandate until December 15, 1994, by which time tariffs implementing our new mandatory virtual collocation rules can be effective. We also reaffirm our fresh look requirements in connection with the mandatory virtual collocation regime, in light of the court's decision to remand this issue. Pending further judicial action or possible legislation, we leave in place for the present our mandatory physical collocation rules, but will replace those rules with new mandatory virtual collocation rules on December 15, 1994.

4. In this order we consider the entire extensive record already assembled in this proceeding,[8] including that compiled in response to the pending petitions for reconsideration of all of our earlier orders.[9] We find that the existing record is fully sufficient to support our decision here, and find no policy reason to supplement the record before moving forward, nor any legal requirement to do so. After reviewing the court's order, we conclude that, for the most part, our decisions in earlier orders in this proceeding on standards, tariffing, rate structure, pricing, and other aspects of the provision of expanded interconnection services should apply with equal force under the new mandatory virtual collocation regime. In particular, we grant increased pricing flexibility to local telephone companies that have implemented expanded interconnection through either virtual or physical collocation. In certain respects, however, we are modifying our requirements to reflect the use of mandatory virtual collocation and to reflect policy changes that we conclude are in the public interest based on petitions for reconsideration of

---

[6] Id., slip op. at 11.

[7] Under the local rules of the U.S. Court of Appeals for the District of Columbia Circuit, parties may file petitions for rehearing within 45 days of the issuance of an order. D.C. Cir. R. 35. The Federal Rules of Appellate Procedure provide that the mandate of the court will be stayed pending the filing of a petition for rehearing, unless otherwise ordered by the court, and that the mandate shall issue 7 days after entry of an order denying a petition for rehearing. The mandate also may be stayed pending application to the Supreme Court for a writ of certiorari. See Fed. R. App. P. 41(a) & (b). In Bell Atlantic v. FCC, the court of appeals stayed the issuance of the mandate until 7 days after the denial of a timely-filed petition for rehearing, or 7 days after the end of the 45 day period, whichever happens sooner. Thus, the earliest possible date that the mandate could issue is August 1, 1994.

[8] The positions of the parties in earlier phases in this proceeding are summarized at length in the Special Access Expanded Interconnection Order, the First Reconsideration Order, the Second Reconsideration Order, and the Switched Transport Expanded Interconnection Order. While we do not duplicate those comment summaries in this order, we take that record into account in reaching our decisions here.

[9] See Appendix A infra.

our earlier orders. Because we envision, under the new collocation policy, that some local telephone companies may voluntarily provide physical collocation as a regulated common carrier service, we are also reaffirming many of our rules relating to the rates, terms, and conditions of physical collocation offerings, and are addressing certain issues regarding physical collocation raised in pending petitions for reconsideration of earlier orders in this proceeding. We deny a petition for declaratory ruling filed by Teleport regarding restrictions on pricing flexibility for LECs that do not opt to offer physical collocation. We also reaffirm our density zone pricing system and other pricing flexibility rules under the new policy, but modify those rules to condition such pricing flexibility on expanded interconnection being operational under the rules we adopt in this order.

B. Background

5. In earlier orders in this proceeding, we required the Tier 1 local exchange carriers (LECs),[10] other than participants in National Exchange Carrier Association (NECA) pools, to permit third parties to interconnect their transmission facilities with those of the LECs. In most cases, we gave interconnectors the right to obtain these connections by physically collocating their own terminating equipment in LEC central offices. We permitted all parties, including competitive access providers (CAPs), interexchange carriers (IXCs), and users, to obtain expanded interconnection. We required the LECs to set rates for expanded interconnection services based on direct costs plus reasonable overhead loadings. We also authorized additional pricing flexibility for LECs that are actually providing expanded interconnection.

6. We introduced our expanded interconnection policy in stages. We decided in September 1992 to require the LECs to provide expanded interconnection with their interstate special access services, primarily through physical collocation.[11] In August 1993, we required the LECs to provide expanded interconnection with the switched network, again primarily through physical collocation, to enable interconnectors to compete more fully for the provision of switched transport service.[12] We also adopted reconsideration orders that modified certain aspects of the Special Access Expanded Interconnection Order in December 1992 and August 1993.[13] The LECs' special access expanded interconnection tariffs became effective in June 1993. Their switched transport expanded interconnection tariffs became effective in February 1994. Both sets of tariffs are currently under investigation.[14]

---

[10] Tier 1 LECs are companies having annual revenues from regulated telecommunications operations of $100 million or more for a sustained period of time.

[11] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) ("Special Access Expanded Interconnection Order"), recon., 8 FCC Rcd 127 (1992), vacated in part and remanded sub nom. Bell Atlantic v. FCC, No. 92-1619 (D.C. Cir., June 10, 1994); recon., 8 FCC Rcd 7341 (1993).

[12] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Transport Phase I, Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374 (1993) ("Switched Transport Expanded Interconnection Order"), pet. for review pending sub nom. Bell Atlantic v. FCC, No. 93-1743 (D.C. Cir., filed Nov. 12, 1993).

[13] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Memorandum Opinion and Order, 8 FCC Rcd 127 (1992) ("First Reconsideration Order") (modifying the set of offices at which we required expanded interconnection to be tariffed initially), vacated in part and remanded sub nom. Bell Atlantic Telephone Cos. v. FCC, No. 92-1619 (D.C. Cir., June 10, 1994); Second Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 7341 (1993) ("Second Reconsideration Order") (modifying requirements regarding "fresh look," non-recurring charges, the extent of the tariffing requirement for virtual collocation, and the rate structures used for expanded interconnection). See infra ¶¶ 197-208 for a definition and discussion of our "fresh look" policy.

[14] Ameritech Operating Companies, CC Docket No. 93-162, 8 FCC Rcd 4589 (Com. Car. Bur. 1993) (instituting investigation into special access expanded interconnection tariffs); Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection for Special Access, CC Docket No. 93-162, Order Designating Issues for Investigation, 8 FCC Rcd 6909 (Com. Car. Bur. 1993); Phase I, First Report and Order, 8 FCC Rcd 8344 (1993) (prescribing interim maximum overhead loading factors); Supplemental Designation Order and Order to Show Cause, DA 94-556 (Com. Car. Bur., released May 31, 1994); Local Exchange Carriers' Rates, Terms, and Conditions

As noted above, on June 10, 1994, the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion stating that it would vacate the Special Access Expanded Interconnection Order and the First Reconsideration Order insofar as they require physical collocation for special access services, and would remand other aspects of the orders to the Commission for further proceedings.[15]

II. PUBLIC POLICY ANALYSIS

7. Orders/Background. Expanded interconnection is a LEC offering that enables parties, by interconnecting their circuits with those of the LEC at a LEC central office through either physical collocation or virtual collocation, to compete on a facilities basis with certain LEC access services. Physical collocation, as defined by the Commission in this proceeding, is an offering that enables an interconnector to locate its own transmission equipment in a segregated portion of a LEC central office. The interconnector pays a tariffed charge to the LEC for the use of that central office space, and may enter the central office to install, maintain, and repair the collocated equipment.[16] The specific details of virtual collocation could be defined in a number of different ways, as described further below in paragraphs 43-46. For purposes of this order, however, we define virtual collocation as an offering in which the LEC owns (or may lease) and exercises exclusive physical control over the transmission equipment, located in the central office, that terminates the interconnector's circuits. The LEC dedicates this equipment to the exclusive use of the interconnector, and provides installation, maintenance, and repair services on a nondiscriminatory basis. Under our virtual collocation policy, the interconnector has the right to designate its choice of central office equipment, and to monitor and control the equipment remotely.[17] The LEC connects this equipment to the interconnector's circuit outside the central office, with an interconnection point between LEC-owned facilities and interconnector-owned facilities as close as possible to the office.[18] The standards governing physical collocation and virtual collocation arrangements are discussed in detail below.

8. Earlier orders in this proceeding have required the Tier 1 LECs to provide expanded interconnection for interstate special access and switched transport. We found that expanded interconnection would promote greater competition in the special access and switched transport markets, and thereby produce substantial public interest benefits. We concluded that such competition, like competition in the markets for long distance and customer-premises equipment (CPE), should encourage LECs and their competitors to operate more efficiently, deploy new technologies facilitating innovative service offerings, increase the choices available to access customers, and reduce the prices of services subject to competition. We found that, given the pricing flexibility we granted to the LECs and (in the case of switched transport) the application of the transport interconnection charge to both LECs' and interconnectors' customers, expanded interconnection would not have any significant adverse impact on universal service. Thus, based on the record, we concluded that the likely benefits of expanded interconnection outweighed any potential disadvantages.[19]

9. Discussion. In response to the court's decision, we first reaffirm our analysis and conclusion in the Special Access Expanded Inter-

---

for Expanded Interconnection for Switched Transport, Memorandum Opinion and Order, 9 FCC Rcd 817 (Com. Car. Bur. 1994) (instituting investigation into switched transport expanded interconnection tariffs).

[15] Bell Atlantic v. FCC, supra note 3.

[16] 47 C.F.R. § 64.1401(f) (redesignated in this order as § 64.1401(d)); Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Notice of Proposed Rulemaking and Notice of Inquiry, 6 FCC Rcd 3259, 3262, ¶ 19 (1991) (First Notice); Special Access Expanded Interconnection Order, 7 FCC Rcd at 7390, ¶ 39.

[17] "Monitoring and control" is a term of art that describes a party's ability to track circuit functions, reconfigure circuits, and otherwise supervise the operation of communications circuits terminating in such equipment. As discussed above, the LEC exercises exclusive physical control of the equipment used in virtual collocation arrangements, and is solely responsible for installing, maintaining, and repairing the equipment.

[18] 47 C.F.R. § 64.1401(g) (redesignated as § 64.1401(e)); First Notice, 6 FCC Rcd at 3262, ¶ 20; Special Access Expanded Interconnection Order, 7 FCC Rcd at 7392-94, ¶¶ 44-46.

[19] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7376-81, ¶¶ 8-18; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7378-86, ¶¶ 6-20.

connection Order and the Switched Transport Expanded Interconnection Order that expanded interconnection for special access and switched transport is in the public interest.[20] Our expanded interconnection policy is designed to facilitate competition for special access and switched transport services, essentially by making it possible to buy only those LEC transmission and distribution links that a customer wants, and to combine those links with the services of a competitor. This policy enables the LECs' competitors to offer transmission segments that can substitute for the previously bundled segments offered by the LECs, and to connect their own transmission segments with transmission and distribution links that the LECs continue to provide. As our experience with the long-distance and customer-premises equipment markets demonstrates, increased competition among interstate special access and switched transport service providers should increase customer options, reduce rates, and speed the introduction of new technologies, and thereby stimulate economic growth. We reaffirm that these benefits of expanded interconnection outweigh any disadvantages of the policy.

10. We next conclude that, although expanded interconnection through physical collocation is the optimal means to realize these benefits, expanded interconnection through virtual collocation also produces these benefits and is in the public interest. Both virtual collocation and physical collocation enable electronic equipment dedicated to an interconnector's use to terminate that interconnector's transmission links and to interconnect them with the LECs' network equipment inside LEC central offices. Without dedicated network equipment located in the central office, interconnectors would be required to buy LEC transmission links that are not needed with collocation. This would make it much more costly to provide competitive access, inhibit interconnectors' ability to price competitively with LECs, and limit the extent of competition for transmission services. Specifically, interconnectors would be required to buy LEC transmission service between interconnector equipment located outside the central office and the central office itself, which is a key point of network traffic aggregation. Dedicated network equipment in the central office allows interconnectors to provide their own transmission facilities to gain access to the traffic aggregated at the central office, and fosters competition in the provision of such transmission facilities.

11. Moreover, the technical parameters of the equipment currently used in communications networks make it necessary in most situations to locate the circuit terminating equipment dedicated to an interconnector's use in the LEC central office. To interconnect two communications circuits (e.g., that of the LEC and that of the competitor), the electronic equipment that terminates each of the circuits must be connected together, or "cross-connected." The technical standards for currently available cross-connect technology require that a cross-connecting cable be no longer than 450 feet, including cable bends.[21] In most LEC central office buildings, all cable enters the building through underground conduits, runs into a cable vault, climbs up risers and sometimes passes through distribution frames, into a secure, properly conditioned room that is often located on the second or higher floor of the building. There are substantial practical obstacles to interconnectors' obtaining space for their equipment in buildings close enough to LEC central office buildings to meet the 450 foot constraint. Thus, the current limitation on the length of cross-connect cables imposes a critically important technical constraint. In most cases, it is not feasible to install a cross-connect cable between the electronic equipment terminating LEC circuits and the equipment terminating a competitor's circuits without duplicative equipment, such as additional repeaters, unless all the equipment is located in the same building -- the LEC central office.

12. Thus, for the reasons set forth above and in our earlier orders,[22] we conclude that collocation of circuit terminating equipment within LEC central offices serves the public interest and is necessary to satisfy our policy goals fully. In our earlier orders, we concluded that physical collocation best ensures that our objectives are fulfilled.[23] If physical collocation is unavailable, however, we conclude that virtual collocation is the best alternative

---

[20] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7378-81, ¶¶ 13-18; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7383-86, ¶¶ 13-20.

[21] Expanded Interconnection with Local Telephone Company Facilities, Comments of Metropolitan Fiber Systems, Inc. at 48-49 & n.69 (Aug. 6, 1991).

[22] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7378-81, ¶¶ 13-18; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7383-86, ¶¶ 13-20.

[23] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7389-90, ¶ 39.

to serve our public interest objectives. We reaffirm and incorporate herein our reasoning and conclusion in the Special Access Expanded Interconnection Order and the Switched Transport Expanded Interconnection Order that we have authority, pursuant to Sections 1, 4(i), 201, 202, 205, 214(d), and 218 of the Communications Act, to mandate expanded interconnection and impose the related requirements specified in this order.[24]

III. INTERCONNECTION ARCHITECTURE

A. Physical and Virtual Collocation

13. Orders/Background. Our previous orders in this proceeding required the LECs to provide expanded interconnection through physical collocation in all central offices for which interconnectors make a bona fide request.[25] We allowed LECs to apply for exemptions from this requirement and provide virtual collocation instead of physical collocation in central offices in which space for physical collocation is unavailable, and in states that had adopted specified virtual collocation policies.[26] We found that the provision of central office space used for physical collocation is incidental to communications, thus rendering it a communications service under Section 3(a) of the Communications Act,[27] and that provision of such space is a common carrier service. We therefore concluded that we have authority to impose Title II regulation, including tariffing requirements, on the provision of such space.[28] We justified our mandatory physical collocation rules as an exercise of our authority under Section 201(a) of the Act to "establish physical connections with other carriers."[29] We also concluded that the physical collocation requirement is not a "taking" under the Fifth Amendment of the Constitution, and that even if it were, such a taking would constitute a lawful exercise of our statutory authority.[30] Our conclusions with respect to our statutory authority to mandate physical collocation, however, were rejected by the court in Bell Atlantic v. FCC.

14. Positions of the Parties on Reconsideration. In petitions for reconsideration of the Special Access Expanded Interconnection Order and other orders in this proceeding, the LECs reiterate their arguments against mandatory physical collocation and the CAPs and other parties reiterate their arguments in

---

[24] 47 U.S.C. §§ 151, 154(i), 201, 202, 205, 214(d), and 218. See Special Access Expanded Interconnection Order, 7 FCC Rcd at 7472-75, ¶¶ 219-26; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7445, ¶ 144. As discussed below, we are imposing mandatory virtual collocation requirements in this order.

[25] For summaries of the parties' comments on this point, see Special Access Expanded Interconnection Order, 7 FCC Rcd at 7382-89, ¶¶ 20-38; Switched Transport Expanded Interconnection Order; 8 FCC Rcd at 7390-91, ¶¶ 27-28.

[26] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7389-94, ¶¶ 39-46; First Reconsideration Order, 8 FCC Rcd at 128-29, ¶¶ 7-18; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7391-96, ¶¶ 29-35. We also permitted LECs to negotiate interstate virtual collocation arrangements with interconnectors at specific central offices and required them to offer the same arrangements to other customers at those offices. Special Access Expanded Interconnection Order, 7 FCC Rcd at 7390-94, ¶¶ 40-46; Second Reconsideration Order, 8 FCC Rcd at 7365-67, ¶¶ 56-59; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7391-96, ¶¶ 29-35.

[27] 47 U.S.C. § 153(a).

[28] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7444-47, ¶¶ 161-63.

[29] 47 U.S.C. § 201(a).

[30] Id., 7 FCC Rcd at 7476-83, ¶¶ 230-40. But see Bell Atlantic v. FCC, slip op. at 9-10.

favor of it.[31] Some CAPs, however, believe that expanded interconnection through properly structured virtual collocation is an effective alternative to promote increased local access competition.[32] The non-dominant IXCs (i.e., IXCs other than AT&T) argue that under the mandatory physical collocation regime, LECs should also be required to offer virtual collocation on a generally tariffed basis at every point at which they offer physical collocation, pointing out some of the potential advantages of virtual collocation. They contend that many interconnectors may prefer virtual collocation, LECs may be able to provide central office equipment and services more efficiently than interconnectors, virtual collocation would conserve central office space and enable more interconnectors to enter, and widespread virtual collocation would enable more IXCs to obtain services comparable in total cost to those obtained by AT&T.[33]

15. Ameritech and USTA argue that LECs should be allowed to choose whether to offer physical or virtual collocation. They assert that virtual collocation entails substantial, burdensome implementation problems and costs (such as providing rapid installation intervals demanded by interconnectors and training technicians to repair and maintain different types of interconnector equipment). They assert that, if LECs are already required to provide physical collocation, it would be unreasonably burdensome for the LECs to be required to incur the unique implementation problems and costs associated with virtual collocation (e.g., training technicians to maintain and repair interconnector equipment at short intervals) even in offices where there is no demand.[34]

16. Discussion. Remand and New Mandatory Virtual Collocation Policy. The Bell Atlantic v. FCC decision presents practical difficulties for interconnectors and their customers even before the issuance of the court's mandate. For example, interconnectors (or their customers) may be reluctant to activate new circuits to their physical collocation nodes in LEC central offices before the issuance of the mandate since some LECs may discontinue their physical collocation offering if and when the mandate issues.[35] At the same time, many LECs have not tariffed a generally available virtual collocation offering as an alternative for interconnectors.

17. Accordingly, in light of the D.C. Circuit's Bell Atlantic v. FCC decision and in anticipation of remand, we are adopting a new expanded interconnection policy that will facilitate the continued, uninterrupted provision of expanded interconnection and will reduce the practical problems that could arise in the wake of the court's decision. As we explain in greater detail below, we believe that this new expanded interconnection policy is fully consistent with the court's view of our authority. Accordingly, we will require, as of September 1, 1994, that Tier 1 LECs (other than NECA pool members) file generally available tariffs offering expanded interconnection through virtual collocation. The standards that will govern virtual collocation arrangements are discussed in detail below. LECs will be exempted from this requirement in central offices where they opt to provide physical collocation subject to the standard described in detail below.

18. Legal Authority. We find primary authority for the modified expanded interconnection requirements adopted in this order in Section 201(a) of the Communications Act of 1934, as

---

[31] See, e.g., USTA Special Petition at 2-8; Centel Special Petition at 2-3, 5-8; United Special Petition at 2-4; GTE Special Petition at 9-12; Rochester Special Petition at 11-14; USTA Special Reply at 8; USTA Switched Petition at 2-3; MFS Special Opposition at 7-9, 13-15; ALTS Special Opposition at 13-15; ALTS Switched Opposition at 1-3; MCI Special Opposition at 17-20; Ad Hoc Special Opposition at 3-5, 8-10; API Special Opposition at 4. See also ¶ 42 infra and ex parte submissions cited therein.

[32] Expanded Interconnection with Local Telephone Company Facilities, Comments of Teleport Communications Group at 20-37 (Aug. 6, 1991). See also "FCC Studies Options in Wake of Interconnection Ruling; LEC Willingness to Offer Physical Collocation Erodes," Telecommunications Reports (June 20, 1994) at 19, 20 (quoting Andrew Lipman, Senior Vice-President--Legal and Regulatory Affairs, MFS).

[33] WilTel Special Petition at 4-7; WilTel Special Reply at 6; CompTel Special Opposition at 4-6; MCI Special Reply at 9-10.

[34] Ameritech Special Opposition at 4-5; USTA Special Opposition at 14-15; see also USTA Special Petition at 2 & n.3 (noting that interconnection without any collocation is possible).

[35] See also MFS Ex Parte (July 5, 1994), Appendices B & C (alleging obstacles to continued functioning of physical collocation imposed by some LECs since the court's decision).

amended.[36] That provision authorizes the Commission, where necessary or desirable in the public interest, to order common carriers to establish physical connections with other carriers, whether or not the common carriers might choose to do so voluntarily.[37] As applicable here, the LECs are "common carriers," the expanded interconnection arrangements required under the terms of this order are forms of "physical connections," and most interconnectors -- including CAPs and IXCs -- are "carriers" within the meaning of Section 201(a). Moreover, as set out in detail above,[38] we have concluded that the provision of the expanded interconnection services required in this order will produce substantial public interest benefits by removing unnecessary barriers to increased competition. Such public interest benefits have lawfully formed the basis for past mandatory interconnection orders,[39] and we find that such benefits justify the interconnection requirements adopted here with respect to interconnectors that are carriers.

19. We find, in addition, that the separate language in Section 201(a) requiring telephone companies to "furnish communications service upon reasonable request" gives the Commission authority to order the LECs to provide expanded interconnection services to non-carrier interconnectors. In this regard, it has been established Commission policy -- informed by the statutory requirements that rates and terms for communications service be just and reasonable and not unreasonably discriminatory[40] -- to prohibit differences in service rates and terms that are predicated upon the type of customer involved.[41] We see no reason to depart from that general policy, particularly where, as here, we find affirmative public interest benefits in the broad availability of expanded interconnection services.[42]

20. We also conclude that Sections 1, 4(i) and 214(d) of the Communications Act[43] buttress further our legal authority to order the expanded interconnection services set out in this order, including the requirement that LECs provide, for a just and reasonable charge, dedicated circuit terminating equipment designated by the interconnector. Section 1 of the Act states that the purpose of the Commission is to regulate "interstate and foreign commerce in communications by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service." Section 4(i), the FCC's "necessary and proper clause,"[44] grants us broad power to take actions necessary to meet our statutory mandate. Finally, Section 214(d) authorizes the Commission "to require by order any carrier ... to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier." We find that, to the extent that there is any doubt whether Section 201(a) alone fully authorizes all aspects of our expanded interconnection order, these sections of the Act provide that supplemental authority.

21. The foregoing discussion largely coincides with the analysis of legal authority that the Commission undertook in the Special Access Expanded Interconnection Order.[45] We recognize that the D.C.

---

[36] 47 U.S.C. § 201(a).

[37] See, e.g., Lincoln Tel. & Tel. Co. v. FCC, 659 F.2d 1092, 1103-06 (D.C. Cir. 1981); Bell Telephone Co. of Pa. v. FCC, 503 F.2d 1250, 1268-73 (3rd Cir. 1974), cert. denied, 422 U.S. 1026 (1975).

[38] See supra ¶¶ 9-12.

[39] See supra n. 37.

[40] See 47 U.S.C. §§ 201(b) & 202(a).

[41] See, e.g., MTS and WATS Market Structure, CC Docket No. 78-72, 97 FCC 2d 682, 722 (1983); Private Line Rate Structure and Volume Discount Practices, 97 FCC 2d 923, 932-32 (1984). See also Atlantic Richfield Co., 3 FCC Rcd 3089, 3091, ¶ 16 (1988), aff'd, Public Utility Comm'n of Texas v. FCC, 886 F.2d 1325 (D.C. Cir. 1989) (noting long-established FCC policy that carriers and non-carriers alike have a federal right to interconnect to the public telephone network in ways that are privately beneficial if they are not publicly detrimental). Accord Hush-A-Phone Corp. v. United States, 238 F.2d 266 (D.C. Cir. 1956).

[42] See supra ¶¶ 9-12.

[43] 47 U.S.C. §§ 151, 154(i), & 214(d).

[44] New England Tel. & Tel. Co. v. FCC, 826 F.2d 1101, 1108 (D.C. Cir. 1987), cert. denied, 109 S. Ct. 1942 (1989); North American Telecomm. Ass'n v. FCC, 772 F.2d 1282, 1292 (7th Cir. 1985).

[45] See 7 FCC Rcd at 7472-75, ¶¶ 219-226.

Circuit, in Bell Atlantic v. FCC, vacated the mandatory physical collocation rules adopted in that order. However, there are differences between those rules and our new regime of mandatory virtual collocation (with an exemption for LECs choosing to offer physical collocation) that are fundamental to the court's analysis in that case.

22. The court's core finding in Bell Atlantic was that Section 201(a) did not "grant third parties a license to exclusive physical occupation of a section of the LECs' central offices."[46] While noting that our power to "order 'physical connections' [was] undoubtedly broad of scope,"[47] the court refused to grant our interpretation the deference normally accorded agencies under Chevron U.S.A. Inc. v. NRDC,[48] because it believed that such a physical occupation "would seem necessarily to 'take' property" under the Fifth Amendment standard established by the Supreme Court in Loretto v. Teleprompter Manhattan CATV Corp.[49] While we do not share the D.C. Circuit's apparent view that mandatory physical collocation requirements would constitute a "taking" of property, or its view that Chevron deference was unwarranted, factual differences between the mandatory physical collocation regime at issue in Bell Atlantic and the modified requirements we are adopting here completely distinguish this order from the facts of Loretto.

23. In Loretto, the Supreme Court found that a New York statute that required landlords to permit cable television companies to install facilities on their buildings effected a Fifth Amendment taking of the landlords' property for which just compensation was due. The Court noted that a takings analysis usually involves essentially ad hoc, factual inquiries regarding factors such as the degree of interference with investment-backed expectations, the economic impact of the regulation, and the character of the governmental action.[50] However, it distilled from earlier takings jurisprudence a pattern that when the character of the regulation reaches the form of a "permanent physical occupation," that factor alone becomes determinative and a taking has occurred.[51] While cautioning that its holding was a very narrow one,[52] the Court explained that a permanent physical occupation of property "effectively destroys" the bundle of rights usually associated with property ownership -- including the right to exclude others.[53]

24. We continue to believe that the mandatory physical collocation requirements we previously adopted should not properly be seen to create a takings issue under Loretto, both because, under the technological and competitive circumstances that we previously advanced to support such a regime, telephone companies have no reasonable historically rooted expectation of being able to exclude interconnectors, and because the telephone companies were permitted to recover just and reasonable rates for the mandated service.[54] In any event, however, the "permanent physical occupation" analysis that is central to Loretto has no bearing on the modified expanded interconnection rules that we are adopting here, which require only virtual collocation (with an exemption for carriers voluntarily choosing to offer physical collocation subject to full regulation as a communications common carrier service).

25. The mandatory virtual collocation policy we adopt here in no way constitutes a taking of property. Under virtual collocation, unlike physical collocation, interconnectors have no right to enter LEC-owned premises or to install their own equipment at such locations. Instead, the LECs purchase or lease equipment designated by the interconnector, and install, maintain, and repair this

---

[46] Bell Atlantic v. FCC, slip op. at 9 (emphasis added).

[47] Id.

[48] 467 U.S. 837 (1984).

[49] 458 U.S. 419, 426 (1982). Bell Atlantic v. FCC, slip op. at 6, 9 (emphasis added).

[50] Loretto, 458 U.S. at 426 (citing Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124, reh'g denied, 439 U.S. 883 (1978)).

[51] Loretto, 458 U.S. at 426; see also id. at 426-35.

[52] Id., 458 U.S. at 441.

[53] Id., 458 U.S. at 435.

[54] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7478, 7479-83, ¶¶ 233, 236, 237, & 240.

equipment themselves (or through their designees)[55] in their central offices. While the interconnector-designated equipment is dedicated to the use of a particular interconnector, such dedication is not unusual in the telecommunications industry, particularly where, as here, the interconnector does not exert physical control over such equipment. (The monitoring and control functions that the LECs must permit interconnectors to perform are conducted from remote locations and involve only the interconnector's ability to track, reconfigure, and otherwise supervise the operation of the communications circuits terminating in the designated equipment.) For example, telephone companies generally dedicate equipment to the use of particular customers in providing private line service. Even local exchange service involves the use of certain pieces of equipment that are dedicated to the exclusive use of a particular customer, such as the line cards used in LEC switches and wire "drops" extending from the LEC's distribution cable to the customer's residence. The expanded interconnection requirement that LECs dedicate circuit terminating equipment to particular customers may -- as with such other "dedicated" services -- affect the use to which the telephone company can apply its property, but it in no way constitutes a physical occupation of the LECs' property within the contemplation of Loretto.[56]

26. We also note that the physical collocation standards we are adopting for telephone companies that voluntarily choose to implement expanded interconnection through physical collocation (thereby gaining an exemption from the virtual collocation requirements) do not implicate Loretto. Loretto's per se rule, where applicable at all, applies only to physical "invasions."[57] Here, the choice to incur physical collocation obligations is voluntary and allows the carrier to avoid the virtual collocation requirements that the Commission otherwise would lawfully impose. This flexibility was not available to LECs under the expanded interconnection regime reviewed by the Bell Atlantic court. Thus, the availability of the exemption for carriers choosing physical collocation makes the regulatory regime we are adopting less burdensome, rather than more so. We find, moreover, that the requirements we are imposing for carriers making that choice are necessary to the pro-competitive purposes of our expanded interconnection policy.

27. Finally, we find -- and the court in Bell Atlantic did not suggest otherwise -- that the modified rules we are adopting easily survive the more factually sensitive standards applicable in "regulatory takings" analysis. Indeed, we read the court's decision as encouraging the Commission to "consider whether and to what extent virtual co-location should be imposed" in the absence of physical collocation.[58] In determining what constitutes a regulatory taking, the courts focus on three main factors: (1) the character of the government action; (2) the regulation's interference with investment-backed expectations; and (3) its

---

[55] See infra ¶¶ 58-60 (if LECs use outside contractors to install and maintain their other equipment, they must do so for the equipment dedicated to the use of interconnectors as well; LECs are not, however, required to permit interconnector personnel to enter central offices).

[56] Indeed, the Court in Loretto gave similar examples of use requirements, in the landlord-tenant context, that could be imposed without creating a per se taking:

> [O]ur holding in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building. ... [Indeed], if [the pertinent statute had] required landlords to provide cable installation if a tenant so desires, the statute might present a different question from the question before us, since the landlord would own the installation.

458 U.S. at 440 & n.19.

[57] See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992); see also Yee v. City of Escondido, 112 S. Ct. 1522, 1530 (1992) ("Because they voluntarily open their property to occupation by others, petitioners cannot assert a per se right to compensation based on their inability to exclude particular individuals."); FCC v. Florida Power Corp., 480 U.S. 245, 251-53 (1987) (the element of "required acquiescence is at the heart of the concept of occupation" under Loretto).

[58] Bell Atlantic v. FCC, slip op. at 11.

economic impact.[59]

28. With respect to the first factor, the Supreme Court has stressed that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, ... than when the interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[60] As already discussed, the regulations at issue here do not constitute a physical invasion of the LECs' property. Rather, they adjust somewhat the "benefits and burdens of economic life to promote the common good."[61] In particular, our expanded interconnection requirements are designed to and, we believe, will increase competition, lower prices, lead to varied new services, and help improve the productivity of our economy as a whole.[62] While the new rules impose some increased regulatory burdens on the LECs, they also provide those carriers with offsetting pricing flexibility with which to compete in the more competitive environment.[63]

29. Our action, moreover, in no way interferes with the LECs' reasonable investment-backed expectations concerning the use of their property. As a general matter, private property used for common carrier purposes has always been imbued with a public character.[64] Given their position as common carriers controlling bottleneck facilities, the LECs must expect that they will be subject to non-streamlined regulation as dominant carriers. Indeed, as already noted, this Commission frequently has ordered common carriers to provide access to bottleneck facilities in order to increase competition and facilitate the development of new services.[65] The Commission has also taken steps to require telephone companies to provide new service features and technologies that we have found would promote competition and improve the functioning of the public telephone network.[66] The LECs here are exchanging compliance with lawful Commission regulation for the privilege, with attendant licenses and franchises, of providing telephone service to the public as interstate dominant common carriers. The Supreme Court has employed similar analysis in finding that no taking has occurred in other heavily-regulated industries.[67]

30. Finally, we find under the last prong of the "regulatory takings" analysis, that virtual collocation does not result in a total, or even a substantial, economic deprivation of the LECs' economic property interests.[68] The LECs will continue to be able to use their property, including the equipment dedicated to interconnectors, in the provision of common carrier services for which they are entitled to charge just and reasonable rates. The new, more competitive environment that expanded interconnection will foster will undoubtedly present the LECs with increased competitive challenges, but the LECs have no property right to continuation of a monopoly or quasi-monopoly environment for the provision of interstate access service. Our decision specifically permits LECs to recover from interconnectors the cost of providing expanded interconnection. We are also granting the Tier 1 LECs continued pricing flexibility in conjunction with expanded interconnection. We do not expect that

---

[59] Penn Central Transp. Co., 438 U.S. at 123-24. See also Lucas v. South Carolina Coastal Council, 112 S. Ct. at 2893.

[60] Penn Central Transp. Co., 438 U.S. at 124.

[61] Id.

[62] See supra ¶¶ 1, 9-12.

[63] See supra ¶ 8.

[64] Munn v. Illinois, 94 U.S. 113, 126 (1876).

[65] See, e.g., Lincoln Tel. & Tel. Co. v. FCC, 659 F.2d 1092; MCI Telecommunications Corp. v. FCC, 580 F.2d 590 (D.C. Cir.), cert. denied, 439 U.S. 980 (1978); Bell Tel. Co. of Pennsylvania v. FCC, 503 F.2d 1250; Cellular Communications Systems, 86 FCC 2d 469 (1981), recon., 89 FCC 2d 58 (1982).

[66] See, e.g., Provision of Access for 800 Service, CC Docket No. 86-10, 6 FCC Rcd 5421, 5425-27, ¶¶ 19-29 (1991), petitions for review pending sub nom. GTE Service Corp. et al. v. FCC, D.C. Circuit No. 91-1507 (and consolidated cases) (requiring LECs to meet enhanced 800 database service performance standards).

[67] See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1007-08 (1984) (regulation requiring disclosure by chemical companies of confidential research and development data in exchange for the right to register and market pesticides in this country held not a taking).

[68] See Lucas, 112 S. Ct. at 2893-95, 2899-2902.

our virtual collocation requirements will impose undue burdens on the LECs, and have structured our requirements to avoid unnecessary difficulties.[69] To the extent that virtual collocation requirements may be shown, in specific central offices in which space is extremely limited, to be prohibitively burdensome, the waiver process is available as a safety valve.[70]

31. Physical Collocation Exemption. A LEC will be exempted from our mandatory virtual collocation requirement at any specific central office or offices for which the LEC opts to offer under tariff expanded interconnection through physical collocation, subject to full regulation by the Commission as a communications common carrier service, including the standards we adopt below for such offerings. We believe that both LECs and interconnectors can benefit from the flexibility provided by such an exemption. We conclude that physical collocation provides an adequate substitute for virtual collocation only if it is offered on a tariffed basis, with generally available rates, terms and conditions, in order to protect interconnectors from potential anti-competitive LEC behavior. Therefore, a LEC's physical collocation offering will exempt it from the general requirement to offer virtual collocation under tariff only if the LEC explicitly consents to offer physical collocation as a communications common carrier offering under non-streamlined Title II regulation.

32. A LEC will qualify for an exemption from the mandatory virtual collocation requirement only if it voluntarily provides physical collocation subject to all the rules relating to physical collocation that are set forth in this order. As part of that regulation, a LEC that has chosen to provide physical collocation at particular central offices will not be permitted to withdraw its physical collocation offering for customers' existing physical collocation nodes at those offices, for either current or new circuits, without Commission certification pursuant to Section 214 of the Communications Act that such a discontinuation of service will not adversely affect the present or future public convenience and necessity.[71] The exemption from the virtual collocation requirement will apply as long as the LEC offers physical collocation. If a LEC has offered physical collocation pursuant to this exemption, and subsequently withdraws its physical collocation offering for new customers at a given location, it will no longer qualify for the exemption, and will be required to offer virtual collocation on a generally available, tariffed basis at that location. Similarly, if a LEC has offered virtual collocation on a generally available, tariffed basis, and later wants to withdraw that offering in a particular central office because it qualifies for the physical collocation exemption in that office, it may withdraw the offering for new interconnectors. In such a case, however, the LEC must continue to make virtual collocation available for existing and new circuits of interconnectors that are already using virtual collocation in that office, unless it obtains Commission certification that such a discontinuation of service will not adversely affect the present or future public convenience and necessity.

33. We find that we have authority to impose these common carriage standards on the LECs' voluntary physical collocation offerings. As previously explained in our Special Access Expanded Interconnection Order,[72] all elements of physical collocation are "communications services," including the provision of central office space, which falls within the statutory definition because it is "incidental" to communications.[73] Moreover, absent the common carriage standards we are imposing on the provision of physical collocation, LECs could undermine the pro-competitive objectives of our expanded interconnection policies, either by charging unreasonably high rates to interconnectors, or by giving special discounts to favored customers. In these circumstances, where we are allowing physical collocation as a substitute for the mandatory virtual collocation requirements that we otherwise would lawfully impose, our Title I powers[74] allow us to impose common carriage conditions on that choice.[75] Moreover, because the LECs are voluntarily choosing to employ physical collocation, we find that that choice constitutes a voluntary holding out so as to

---

[69] See, e.g., ¶¶ 44, 53, 58, 95, 98, & 208 infra.

[70] See ¶ 65 infra.

[71] 47 U.S.C. § 214(a).

[72] 7 FCC Rcd at 7443-47, ¶¶ 160-63.

[73] See 47 U.S.C. § 153(a).

[74] 47 U.S.C. §§ 151, 152, & 154.

[75] See, e.g., Southwestern Bell Tel. Co. v. FCC, 19 F.3d 1475, 1483 (D.C. Cir. 1994); Lincoln Tel. & Tel. Co. v. FCC, 659 F.2d at 1107-09; Computer and Communications Industry Ass'n v. FCC, 693 F.2d 198, 212-14 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983).

confer common carriage status under Title II of the Act.[76]

34. In Southwestern Bell Telephone Co. v. FCC,[77] the D.C. Circuit remanded an order of the Commission requiring LECs to continue offering under general tariff "dark fiber" services that the carriers had voluntarily initiated under individual case basis (ICB) tariffs. The Commission in that case, however, had never made an affirmative finding that the dark fiber services that the carriers had initiated on a limited, individually negotiated basis, needed to be offered on a common carriage basis in order to advance the public interest objectives of the Communications Act. Rather, the Commission had simply found that because the carriers had documented their limited offerings by filing ICB tariffs, those filings alone conferred common carriage status upon the offerings under the voluntary "holding out" test established in NARUC I and NARUC II.[78] The court in Southwestern Bell held that the mere fact of such filings, standing alone, was insufficient to impose general common carriage obligations on the LECs. By contrast, in this proceeding, we have explicitly determined, pursuant to Section 201(a) and other provisions of the Communications Act, that the expanded interconnection services we are requiring are necessary or desirable in the public interest, and that any carrier choosing the physical collocation option must provide such service as a common carrier.[79] This affirmative finding on the basis of an extensive record fully distinguishes this case from Southwestern Bell.

35. Alternative Interconnection Offerings. Although we are moving forward now with the mandatory virtual collocation regime defined herein in response to the court's order, we remain open to alternative interconnection arrangements that telephone companies may propose in waiver petitions, if those proposals satisfy the public interest objectives achieved by our virtual collocation requirements. Moreover, LECs are free to tariff alternative virtual collocation, physical collocation, or other arrangements that interconnectors may want to take in addition to the baseline arrangements satisfying the LECs' basic obligations under the rules adopted herein. Such alternatives may be negotiated between the parties, although such negotiated arrangements must be filed as tariffs to enable other interconnectors desiring the same arrangement in the same central office to obtain them. While LECs are not required to offer such negotiated arrangements, we envision that LECs and interconnectors will be able to cooperate in developing particular arrangements that meet their mutual needs.

36. Implementation. The LECs subject to expanded interconnection requirements shall file tariffs offering virtual collocation as defined herein on September 1, 1994, to be effective on December 15, 1994. Given our previous experience with expanded interconnection tariffs, and the likely complexity and need for detailed review of these new tariffs, December 15 is the earliest date by which we can ensure that the tariffs will have undergone adequate review by the Commission's staff. LECs must amend their initial tariff filings by October 3, 1994 if they are required to tariff rates for services using additional interconnector-specified circuit terminating equipment.[80] Petitions to reject or suspend and investigate any of these tariffs should be filed by October 14, 1994; replies will be due on October 31, 1994. LECs that wish to be exempted from the virtual collocation requirement must, on September 1, 1994, file any necessary tariff revisions to implement physical collocation in accordance with the rules set forth in this order, or notify the Chief, Tariff Division, Common Carrier Bureau, in writing that no such revisions are necessary and explain the basis for that conclusion. Unlike the procedure for obtaining exemptions from the current physical collocation requirement, we are not requiring LECs to obtain our advance approval before making use of the physical collocation exemption from the virtual collocation requirement. LECs will, however, be held to the rules set forth herein concerning physical collocation offerings made in lieu of the mandatory virtual collocation requirement.

37. We also emphasize that the mandatory physical collocation requirement adopted in our earlier orders, which the Bell Atlantic v. FCC court

---

[76] See National Ass'n of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 641 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) (NARUC I); National Ass'n of Regulatory Utility Commissioners v. FCC, 533 F.2d 601, 608 (D.C. Cir. 1976) (NARUC II) (common carrier status can arise either from a voluntary holding out or from legal compulsion).

[77] 19 F.3d 1475 (D.C. Cir. 1994).

[78] NARUC I, 525 F.2d at 641; NARUC II, 533 F.2d at 608-09.

[79] See supra ¶¶ 31-32.

[80] See infra ¶ 51.

has stated it would vacate with respect to special access expanded interconnection, remains in effect until the court issues the mandate in that case, and the LECs may not propose to withdraw, suspend, or otherwise abrogate their current special access physical collocation offerings until then. Assuming the mandate does not issue before December 15, 1994, our rules requiring that LECs offer both special access and switched transport expanded interconnection through physical collocation will remain in effect until December 15, 1994.

B. Locations Where Expanded Interconnection Must Be Made Available

38. Orders/Background. In the Special Access Expanded Interconnection Order, we required LECs to make expanded interconnection for special access available in all end offices, serving wire centers, and remote nodes used as rating points for special access.[81] In the First Reconsideration Order, we modified this requirement, and decided that LECs must tariff expanded interconnection for special access initially only in a subset of offices that took account of interconnectors' needs, as reflected in lists they submitted to the LECs. LECs were required to provide interconnection in additional offices upon bona fide request.[82] In the Switched Transport Expanded Interconnection Order, we adopted the same approach as the First Reconsideration Order, and extended the requirements for switched transport expanded interconnection, on a bona fide request basis, to tandem offices and remote nodes or switches that serve as rating points for switched transport and that have the necessary space and technical capabilities.[83]

39. Discussion. For purposes of implementing our mandatory virtual collocation regime, we require, as we did in the First Reconsideration Order, that LECs provide expanded interconnection in a subset of their central offices in their initial tariffs. In this instance, LECs should initially tariff expanded interconnection in all offices in which it is currently tariffed. Under either virtual collocation or physical collocation, this approach reduces the burdens on the LECs, while making expanded interconnection available in all central offices in which interconnectors have a realistic interest in the near future. Under the mandatory virtual collocation rules, if a LEC receives a bona fide request to make expanded interconnection available in additional central offices, the LEC must file tariff revisions offering virtual collocation (or, if it qualifies for an exemption, physical collocation) in such offices within 45 days of receipt of such a request. Such tariff revisions shall be effective on 45 days notice or less. We also reaffirm that, under the policies adopted in this order, LECs must provide: (1) both special access and switched transport expanded interconnection at central offices that are classified as end offices and service wire centers, (2) special access expanded interconnection at remote nodes that are rating points for special access;[84] and (3) switched transport expanded interconnection on a bona fide request at "stand-alone tandems"[85] and at remote nodes that serve as rating points for switched transport and have the necessary space and technical capabilities to originate and terminate switched traffic.[86]

IV. STANDARDS

40. Overview. In this section, we address the detailed standards that will govern mandatory virtual collocation. We also address the standards that will apply to physical collocation when it is offered to obtain an exemption from the virtual collocation requirement. Except for the policy changes described below, we conclude on the basis of the record previously compiled that the virtual collocation standards adopted in earlier orders in this proceeding should continue to apply under the new mandatory virtual collocation requirement. We also find that the standards we adopted as part of our mandatory physical

---

[81] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7417-18, ¶¶ 103-104.

[82] First Reconsideration Order, 8 FCC Rcd at 128-29, ¶¶ 7-18.

[83] Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7407-09, ¶¶ 53-57.

[84] A "rating point" is a point used in calculating the length of interoffice links. Special Access Expanded Interconnection Order, 7 FCC Rcd at 7417, ¶ 103.

[85] A "stand-alone tandem" is defined as a LEC tandem office that is not collocated with a LEC end office or serving wire center. Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7409, ¶ 56.

[86] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7417-18, ¶¶ 103-04; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7407-09, ¶¶ 53-57.

collocation requirement remain appropriate in the context of physical collocation provided voluntarily under the new rules.[87]

A. Standards Governing Virtual Collocation

1. In General

41. Orders. In the Special Access Expanded Interconnection Order, we rejected some LECs' contentions that the Commission should establish general interconnection goals or principles in lieu of detailed rules. Instead, we concluded that the adoption of detailed standards would speed the implementation of expanded interconnection by clarifying the rights and obligations of LECs and interconnectors, thereby reducing the disputes that could arise during the implementation process.[88]

42. Positions of the Parties. In recent ex parte filings, CAPs have argued that virtual collocation should be defined to impose more stringent obligations on the LECs. For instance, some CAPs urge that the Commission require virtual collocation arrangements to be "technically and economically comparable to actual collocation."[89] Other CAPs argue that any expanded interconnection arrangement should be "technically and economically comparable" to the LEC's own internal interconnections.[90] Bell Atlantic, by contrast, argues that the Commission's existing virtual collocation standards are fully adequate.[91] Ameritech asserts that the Commission should not mandate any specific interconnection arrangement, but should just set general standards with the choice among alternatives left strictly to the LECs.[92] US West argues that it should be required to offer only a standardized list of central office equipment under virtual collocation, rather than permitting interconnectors freedom to designate any equipment they choose.[93]

43. Discussion. The specific details of virtual collocation could be defined in a number of different ways. We here consider a range of different standards. At one extreme, we could adopt the CAPs' proposal to require virtual collocation offerings to be technically and economically comparable to physical collocation, from the perspective of the interconnector.[94] In our view, this standard would impose burdens on the LECs that are unnecessary to protect interconnectors' interests, and in some cases may be unenforceable.[95] Moreover, a court applying the Bell Atlantic v. FCC decision could construe mandatory virtual collocation under this standard to be an unauthorized taking of property, because this standard would appear to impose requirements that, in practice, are equivalent to mandatory physical collocation.

44. Under the approach we choose here, we adopt rules governing mandatory virtual collocation that are similar to the rules we adopted in earlier orders in this proceeding to govern virtual collocation.[96] Under these rules, LECs will be required to dedicate to interconnectors' use in terminating the interconnectors' circuits any kind of central office basic transmission equipment reasonably specified by the interconnector. LECs will be required to install, maintain, and repair this equipment, at a minimum, under the same time intervals and with the same failure rates that apply to comparable LEC equipment not dedicated to interconnectors. Interconnectors will be

---

87 Special Access Expanded Interconnection Order, 7 FCC Rcd at 7391-94, 7409-18, ¶¶ 43-46, 84-104; Second Reconsideration Order, 8 FCC Rcd at 7391-96, ¶¶ 29-35; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7392-96, 7407-16, ¶¶ 30-35, 53-69.

88 Special Access Expanded Interconnection Order, 7 FCC Rcd at 7405-06, ¶¶ 69-72.

89 Teleport Ex Parte (July 1, 1994) at 1-3; U S Signal Corp. Ex Parte (July 7, 1994) at 1-3; ALTS Ex Parte (July 6, 1994) at 2-3; Electric Lightwave, Inc. Ex Parte (July 7, 1994) at 2.

90 MFS Ex Parte (July 5, 1994) at 3; Intermedia Communications of Florida, Inc. Ex Parte (July 6, 1994) at 2.

91 Bell Atlantic Ex Parte (July 7, 1994) at 2.

92 Ameritech Ex Parte (July 7, 1994) at 1.

93 U S West Ex Parte (July 6, 1994), Attachment.

94 See supra ¶ 42 and ex parte submissions cited therein.

95 See infra ¶ 62.

96 Special Access Expanded Interconnection Order, 7 FCC Rcd at 7392-94, ¶¶ 44-46; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7392, ¶ 30; 47 C.F.R. § 64.1401(g) (redesignated in this order as § 64.1401(e)).

entitled to monitor and control this equipment remotely. LECs will be exempt from the virtual collocation requirement if they provide physical collocation offerings that satisfy our requirements. Tariffing, rate structure, and pricing requirements will ensure that virtual collocation is generally available on a non-discriminatory basis and fulfills our public interest objectives. As explained in detail elsewhere in this order, we conclude that these standards ensure that interconnectors have a realistic opportunity to compete with LEC special access and switched transport services, while also minimizing burdens on the LECs and satisfying the strictures on our authority announced in Bell Atlantic v. FCC.[97]

45. Under a less detailed approach, rather than giving interconnectors the right to designate their choice of central office transmission equipment, we could require LECs and interconnectors to negotiate a limited array of equipment that would satisfy both of their needs. Under an even less specific approach, we could allow the LECs to provide virtual collocation by offering a limited array of central office transmission equipment reasonably selected by the LEC, not the interconnector. Interconnectors would have the right only to select one of the types of equipment offered by the LEC. Under either of these approaches, the requirements discussed in this order would apply in other respects: remote monitoring and control by interconnectors; LEC installation, maintenance, and repair standards; and rate structure and pricing principles. We conclude that these approaches are less satisfactory than the standards we adopt in this order, because any restrictions in the choice of equipment limits interconnectors ability to determine the configuration of circuits in their network.

46. On the other hand, in the unlikely event a court were to hold that we lack authority to require that interconnectors be able to specify the virtually collocated equipment dedicated to their use, we intend that this requirement be replaced by the first approach described in the preceding paragraph, under which LECs and interconnectors would negotiate the range of equipment available for virtual collocation. We find this to be an acceptable alternative that promotes most of our public interest objectives, and we would adopt it in place of the requirements set forth herein. If a court were to hold that we lack authority to impose even that approach, we intend that the second approach described in the preceding paragraph, under which the LEC specifies the equipment that the interconnector could select, be used as a replacement. Moreover, if a court were to hold that we lack authority to impose any of the other specific requirements included in the standards described in paragraph 44, we intend that the offending provision be removed. We find that these approaches would be acceptable, although substantially less desirable, options.

2. Equipment Designation

47. Orders/Background. Our existing rules define virtual collocation as "an offering that enables interconnectors to designate or specify equipment needed to terminate basic transmission facilities."[98]

48. Positions of the Parties. US West argues that it should be required to offer only a standardized list of central office equipment under virtual collocation, rather than permitting interconnectors freedom to designate any equipment they choose.[99] The CAPs generally argue for imposing more stringent requirements regarding interconnectors' rights to specify equipment under a mandatory virtual collocation regime.[100] MFS argues that it should not be required to use LEC-specified equipment, arguing that this would require it to modify its centralized network management system to accommodate the unfamiliar equipment.[101]

49. Discussion. We reaffirm that under our virtual collocation policy, interconnectors have the right to select the type of central office equipment dedicated to their use. The right to designate equipment is critical to enable interconnectors to determine the configuration of their circuits that terminate in such equipment. In many cases, CAPs and other parties may deploy equipment in their networks that differs from the types of equipment in LECs' networks. Under current technology, a circuit cannot function unless compatible equipment, typically of the same type and made by the same manufacturer, is deployed on both ends. Thus, a broad interconnector

---

[97] See supra ¶¶ 16-37, infra ¶¶ 49-53, 57-62.

[98] 47 C.F.R. § 64.1401(g)(1) (redesignated as § 64.1401(e)(1)).

[99] U S West Ex Parte (July 6, 1994), Attachment.

[100] See supra ¶ 42 and comments cited therein.

[101] MFS Ex Parte (July 5, 1994) at 14.

right to designate equipment helps ensure that virtual collocation provides a realistic opportunity for access competition.

50. In addition to our requirement that LECs offer virtual collocation of any type of transmission equipment reasonably requested by interconnectors, we also require that LECs offer virtual collocation through generally available tariffs. We are specifying tariffing procedures for the LECs' service offerings involving virtual collocation equipment to ensure that both these requirements are satisfied. The procedures we adopt are comparable to the process we designed in the First Reconsideration Order to govern the tariffing of central offices, which accommodated both the LECs' need for certainty in devising their physical collocation tariffs and the interconnectors' desires that expanded interconnection be offered in specified locations. In that order, we directed the LECs to publish lists of central offices in which physical collocation would be offered, authorized the interconnectors to request that the lists be expanded to include additional offices, and required the LECs to file tariffs that took into account the interconnectors' submissions. We also required the LECs, after the initial physical collocation tariffs took effect, to revise their tariffs to offer physical collocation in additional central offices upon bona fide requests from interconnectors. We conclude that an analogous process would be useful in assuring that interconnectors' needs for particular types of equipment are satisfied, while also giving the LECs greater certainty about the range of equipment likely to be used initially, and facilitating a smooth process of filing and reviewing virtual collocation tariffs.

51. Prospective users of virtual collocation may request that LECs include specific types of equipment that they are likely to use initially, and would like to have included in the tariffs. If they submit such requests to the LECs by August 1, 1994, the LECs are required to include specific rates for the requested equipment in their virtual collocation tariffs filed on September 1, 1994. Prospective users of virtual collocation may continue to give the LECs requests for tariffing specific equipment through September 1, 1994. By October 3, 1994, LECs must amend their initial tariff filings to include specific prices for all of the equipment identified by interconnectors by September 1. During the period from September 1 to December 15, interconnectors may continue to submit equipment requests, although in order to facilitate an orderly tariffing process, we will permit LECs to treat those requests as if they were received on the day after the tariffs become effective, subject to the procedure outlined in the next paragraph.

52. After the initial tariffs become effective, interconnectors will continue to have the right to specify additional types of virtual collocation equipment. An interconnector may request that a LEC modify its virtual collocation tariffs to offer additional types of transmission equipment. The LEC will be required to modify its tariff accordingly within 30 days of receiving such a request. Such tariff changes should be scheduled to become effective on 30 days notice. This procedure will ensure that interconnectors can make rapid modifications to their networks and obtain corresponding additions to the LEC's offerings of central office equipment that is dedicated to their use. The requirement ensures that interconnecting parties can upgrade their networks to take account of technological improvements, and will help achieve our objective that access competition through virtual collocation spurs technological progress.

53. These equipment designation requirements are unlikely to impose substantial burdens on the LECs. We anticipate that in most cases, LECs will not be called on to serve more than a few interconnectors in any given central office, and the number of different types of dedicated transmission equipment is likely to be reasonably limited given that there is a relatively small number of manufacturers of such equipment. In addition, we reaffirm that, under our new expanded interconnection policy, LECs may proscribe the use of interconnector-designated equipment or practices that represent a significant and demonstrable technical threat to the LEC network. We will scrutinize any such allegations brought to our attention carefully, however, and expect them to be rare.[102]

3. Installation, Maintenance, and Repair

54. Orders/Background. Virtual collocation requires that the LEC install, maintain, and repair the central office electronic equipment dedicated to an interconnector's use. Existing rules require the LECs, at a minimum, to install, maintain, and repair this equipment under the same time intervals and with the same failure rates that apply to the performance of similar functions for comparable LEC equipment. We have required LECs to keep records and file annual reports on the installation, maintenance, and repair times and failure rates for comparable LEC and inter-

[102] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7392, ¶ 44 n.101.

connection equipment and circuits.[103]

55. Positions of the Parties. In petitions for reconsideration, Teleport and ALTS argue that the LECs should be required to install, maintain, and repair virtual collocation equipment to meet the interconnector's standards rather than the LEC's standards, so that CAPs can control the quality of their services and so that virtual collocation can be technically and economically equivalent to physical collocation.[104] The LECs respond that the absolute equivalence standard requested by the CAPs is unworkable and could disadvantage LEC customers other than interconnectors. The LECs further assert that such a standard is unnecessary because either interconnectors accept LEC performance standards for the LEC-provisioned transmission segment to which the interconnector is connecting or they can bypass the LEC entirely rather than interconnecting. The LECs add that the existing virtual collocation standard prevents discrimination and ensures efficient service to interconnectors.[105]

56. In more recent filings, CAPs argue that LEC charges for installation, maintenance, and repair under their current virtual collocation tariffs are excessive. MFS asserts that LECs have charged interconnectors large sums for training multiple shifts of LEC personnel in each office to install, maintain, and repair interconnector-designated equipment. MFS also states that LECs have required interconnectors to purchase "excessive amounts" of spare parts to ensure prompt repair, and have then charged for the storage of those parts. The solution the CAPs propose is to require all LECs that certify third parties to install, maintain, and repair equipment in their central offices to certify interconnectors as well on a non-discriminatory basis, and to allow the interconnectors to perform these functions themselves.[106] LECs have also indicated concerns about being held responsible for installing, maintaining, and repairing unfamiliar equipment.[107]

57. Discussion. In our virtual collocation regime, the LECs are responsible for installing, maintaining, and repairing the central office equipment that they own and dedicate to the use of interconnectors. In general, we reaffirm our conclusion in earlier orders that LECs must provide these services, at a minimum, under the same time intervals, and with the same failure rates, that apply to the performance of similar functions for comparable LEC equipment. Failure to provide these functions on equipment dedicated to interconnectors in a manner that is at least as timely and efficient as the service the LECs provide themselves for services that compete with interconnectors' offerings constitutes an unreasonable practice under Section 201(b) of the Communications Act. We conclude, contrary to the arguments of the LECs, that this standard will not impose disproportionate burdens on the LECs.

58. Evidence in the record shows that many LECs have procedures for certifying or approving equipment manufacturers and independent contractor personnel to install electronic equipment, and in some cases, to maintain and repair such equipment.[108] Use of outside contractors can reduce LEC costs, particularly in cases when LEC employees do not routinely install, maintain, or repair particular types of equipment, or are not qualified to do so. Using outside contractors could reduce or eliminate a LEC's need to train employees to provide service on types of interconnector-designated equipment that are not typically deployed elsewhere in the LEC's network. Similarly, use of outside contractors would allow interconnectors to avoid the substantial costs that might be incurred to train LEC personnel to install, maintain, and repair interconnector-designated equipment with which LEC personnel are unfamiliar. Thus, LECs, as well as interconnectors, may benefit from the use of outside contractors. Of course, if an interconnector designates equipment that

---

[103] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7393-94, ¶¶ 45-46; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7392, ¶ 30.

[104] Teleport Special Petition at 17-18; Teleport Special Reply at 6-7; ALTS Special Petition at 20-21; ALTS Special Reply at 13.

[105] Ameritech Special Opposition at 10-11; Bell Atlantic Special Opposition at 7; GTE Special Opposition at 20-22; United Special Opposition at 8-9; USTA Special Opposition at 19; Ameritech ex parte (styled "Further Opposition to Petitions for Reconsideration") at 2-6 (Feb. 18, 1993).

[106] MFS Ex Parte (July 5, 1994) at 12, 17-20; see also Electric Lightwave, Inc. Ex Parte (July 7, 1994) at 3; Intermedia Ex Parte (July 6, 1994) at 2-3.

[107] SW Bell Ex Parte (July 7, 1994) at 1; U S West Ex Parte (July 6, 1994), Attachment.

[108] MFS Ex Parte (July 5, 1994) at 17-18 and Appendices E & F.

a LEC currently uses in a given central office, the LEC will not need to provide training to its employees and therefore will not be permitted to charge the interconnector for training LEC personnel to service that equipment.

59. Virtual collocation customers should not be required to pay for costly training of LEC employees if the LEC uses qualified outside contractors to install, maintain, and repair other equipment in its offices. We therefore conclude that LECs that permit outside service representatives to enter their central offices to install, maintain, or repair LEC equipment must permit outside representatives to provide these services for the equipment dedicated to interconnectors' use under virtual collocation. If LECs can choose from a range of levels of service quality offered by outside service representatives (e.g., repair times), the LECs must offer the same range of service options to virtual collocation customers in their tariffs. LECs may impose conditions, including certification and bonding requirements, on the contractors that provide service for equipment dedicated to interconnectors, but these requirements must be the same as the requirements that apply to contractors that provide service for other LEC equipment. If LECs use outside contractors to install, maintain, or repair equipment, they must reasonably consider both price and service quality in selecting contractors to provide these services.

60. If an interconnector meets the LEC's standards for outside service representatives, then the interconnector should be certified as a possible outside contractor. Indeed, we see mutual benefits to the LEC and interconnector deriving from use of a certified interconnector's representative for these functions, potentially simplifying the operation of virtual collocation. However, in light of the D.C. Circuit's decision striking down arguably similar requirements in Bell Atlantic v. FCC, we do not here require a LEC to select the interconnector to provide these services for the LEC's equipment dedicated to the interconnector. Although LECs are generally required to consider cost in selecting a contractor, a LEC will not be required to choose an interconnector to perform installation, maintenance, and repair on this basis alone. We therefore do not adopt MFS's proposal to give interconnectors the right to perform installation, maintenance, and repair of the LEC equipment dedicated to their use. LECs that do not permit outside contractors to enter their central offices are not required to permit such contractors to provide service for equipment dedicated to interconnectors' use, although they are permitted to do so, and may find it the most advantageous way of implementing virtual collocation. Thus, any decision to grant physical access to certified interconnector representatives will be voluntary on the part of the LEC.

61. To provide a basis for monitoring compliance with our prohibition of discrimination in the installation, maintenance, and repair of virtual collocation equipment, we require the LECs to report on the timing and failure rates for providing such services for comparable LEC and interconnector-dedicated equipment and circuits. In light of the importance of non-discriminatory installation, maintenance, and repair under our new mandatory virtual collocation policy, we increase the frequency of these required reports from annually, as currently required, to quarterly. We delegate authority to the Chief, Common Carrier Bureau, to specify the format and timing of these reports. LECs are not subject to this reporting requirement if they are exempt from the virtual collocation requirement because they provide physical collocation in all central offices in which they provide expanded interconnection.

62. We find no reason to impose more stringent installation, maintenance, or repair standards upon LECs. Specifically, we decline to require the LECs to install, maintain, and repair interconnectors' virtual collocation equipment to meet the interconnectors' time intervals. We reaffirm our conclusion in the Special Access Expanded Interconnection Order that such a requirement would be difficult or impossible to enforce, because it could require LECs to maintain and repair their competitors' equipment faster and more effectively than the LECs maintain and repair their own.[109] Moreover, such a requirement would be of limited utility because the interconnectors already essentially acquiesce to LEC performance standards on the LEC circuits to which interconnector circuits are connected, and because interconnectors can achieve a high level of reliability through the use of electronics with redundant components and remote monitoring and control rather than through expedited repair procedures.

4. Other Requirements for Virtual Collocation

63. Orders/Background. In earlier orders in this proceeding, we held that the cross-connect element, covering short cable connections from the LEC distribution frame to the central office electronic

[109] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7393-94, ¶ 45 n.103.

equipment dedicated to or owned by the interconnector, should be tariffed at a study-area-wide averaged rate under both virtual collocation and physical collocation. We concluded that certain other charges, such as labor and materials charges for installation, maintenance, and repair services, may differ in different central offices due to cost variations, but should be uniform for all interconnectors in each individual central office. We allowed LECs and interconnectors to negotiate the rates, terms, and conditions for the use of different types of central office electronic equipment dedicated to interconnectors' use in order to address particular interconnectors' needs, but required such negotiated arrangements to be made available to similarly situated interconnectors in the same central office under tariff.[110]

64. Discussion. Except as stated elsewhere in this order, we reaffirm our existing rules on the tariffing of virtual collocation offerings, for the reasons stated in our original orders. We reaffirm that the cross-connect element must be tariffed at a study-area-wide averaged rate that is the same for both virtual collocation and physical collocation for LECs that choose to offer physical collocation. In addition, because we now recognize that the cost of transmission equipment does not vary in different locations, we require that LECs' rates for particular types of equipment offered to interconnectors may not vary within a study area. While we are permitting certain cost-based variations in the rates for specific types of equipment used by different interconnectors, as described below,[111] such rate differences are not dependent on the characteristics of particular central offices or locations within a study area. We also reaffirm, in the context of our mandatory virtual collocation policy, that rates for elements of virtual collocation other than the cross-connect element and elements recovering the cost of central office equipment may reasonably vary in different locations corresponding to cost differences.

65. In unusual circumstances, space may be so limited in particular central offices that even virtual collocation is infeasible in those locations. As noted in our earlier orders,[112] we will entertain requests for waiver of the requirement that virtual collocation be made available in such offices.

66. Finally, SW Bell argues that the requirement in our earlier orders that it take interconnector needs into account in planning its space needs for the future converts virtual collocation into a taking of its property.[113] SW Bell contends that virtual collocation requires LECs to reserve central office space anticipated to be requested by interconnectors and refrain from using that space for their own purposes, and asserts that these requirements effectively deprive the LECs of all interest in that reserved space.[114] SW Bell seems to have misinterpreted the language of our earlier order as requiring LECs affirmatively to set aside space in new and existing central offices to meet anticipated virtual collocation requests. We now clarify that LECs need not set aside segregated space, which they could not then use for their own purposes, in anticipation of virtual collocation requests. Virtual collocation arrangements do not involve the reservation of segregated central office space for the use of interconnectors. LECs must consider the needs of virtual collocation customers, just as they consider the demand for other services in planning space usage. We will not tolerate any discrimination against interconnectors vis-a-vis other customers, however.

B. Standards Governing Physical Collocation

1. Space Allocation and Exhaustion

67. Orders/Background. Our existing rules require the LECs to offer space for physical collocation on a first-come, first-served basis, and to provide virtual collocation in central offices in which space for physical collocation is unavailable or

---

[110] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7441-43, ¶¶ 156-59; Second Reconsideration Order, 8 FCC Rcd at 7365-67, ¶¶ 56-59; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7421-22, ¶ 86.

[111] See infra ¶¶ 124-127.

[112] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7417, ¶ 103 n.240.

[113] Southwestern Bell Telephone Company's Petition for Stay, Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141 (filed Nov. 18, 1992) at 5-8, citing Special Access Expanded Interconnection Order, 7 FCC Rcd at 7392-93, 7403, 7408 & n.191, 7490 n.605, ¶¶ 44, 65, 77, 79 & n.191, 259 n.605.

[114] SW Bell Petition for Stay at 7.

becomes exhausted.[115] We did not require LECs to expand their facilities or relinquish space reserved for their future use in order to offer physical collocation, but we did state that we expected the LECs to consider interconnector demand for central office space when remodeling or constructing new central offices.[116]

68. Positions of the Parties on Reconsideration. USTA suggests that the Commission permit LECs to initiate lotteries, or combinations of "first-come, first-served" and lottery mechanisms, in appropriate circumstances, rather than requiring use of a "first-come, first-served" mechanism.[117] MCI opposes USTA's idea, citing the Commission's experience with the abuse of lotteries in the mobile service context by speculators.[118] Rochester argues, and MFS agrees, that waivers should be available for certain situations in which space is so limited that neither physical nor virtual collocation is feasible, particularly if the LEC makes alternative arrangements available.[119]

69. MFS and ALTS argue that to justify an exemption from the physical collocation requirement due to exhaustion of space in particular central offices, LECs should be required to make a specific showing, including affidavits detailing the planned uses of space within the 24 months following the petition filing date.[120] The LECs respond that such micro-management of LEC central office usage would amount to an unnecessary intrusion into LEC long-range planning, could interfere with other Commission and state regulatory policies, might require them to reveal confidential and proprietary information about LEC business plans such as growth projections and equipment upgrades, and essentially elevates the CAPs' interest in LEC central office space over the LECs' interest in their own property to serve their customers' future needs.[121]

70. Discussion. The exemption from the physical collocation requirement due to space limitations will generally not be relevant under our new mandatory virtual collocation rules. LECs that are providing physical collocation on a voluntary basis and have been exempted from the virtual collocation requirements may exhaust the space available for interconnection in a central office. In that case, just as under the original rules, upon Commission approval of a showing that space is unavailable, the LEC will be required to provide generally available, tariffed virtual collocation to subsequent interconnectors. For the same reasons set forth in our earlier orders,[122] we conclude that under our new policy, if physical collocation is the only generally tariffed expanded interconnection offering, permitting LECs to turn away interconnectors when space for physical collocation is exhausted could prevent interested parties from interconnecting in offices where space is limited. In most cases, requiring LECs to provide a virtual collocation alternative when space has been exhausted in such offices will ensure that all potential interconnectors can be accommodated, without imposing unreasonable burdens on the LECs.

71. We conclude that the same standards and procedures will apply to such requests based on space limitations that apply to such requests under our existing rules.[123] We decline to adopt the extensive requirements proposed by the CAPs regarding the processing of requests to govern space limitations. The CAPs filed these proposals before the Common Carrier Bureau processed the LECs' petitions for exemptions due to space limitation. In the proceedings initiated by those petitions, the LECs provided detailed information regarding central office space availability, in many cases including floor plans and statements regarding future plans. We believe that

---

[115] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7407-08, ¶¶ 77-80; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7403, ¶ 47.

[116] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7407-08, ¶¶ 77-80; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7403, ¶ 47.

[117] USTA Special Petition at 10 n.27; USTA Special Reply at 9.

[118] MCI Special Opposition at 9 n.8.

[119] Rochester Special Petition at 7-10; MFS Special Opposition at 22.

[120] ALTS Special Petition at 17-18; MFS Special Petition at 20, 21.

[121] Ameritech Special Opposition at 12-13; Bell Atlantic Special Opposition at 5; GTE Special Opposition at 18-20; NYNEX Special Opposition at 11-12; USTA Special Opposition at 18.

[122] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7407-08, ¶¶ 77-80.

[123] Id.

in general, the existing procedures worked well and CAPs' concerns regarding possible manipulation were unfounded. If additional information in a particular case is needed to analyze fully a LEC request for exemption due to space limitations, the Common Carrier Bureau can require the LEC to submit such information when the need arises.

72. We conclude that, for LECs that choose to offer physical collocation pursuant to the terms of this order, a first-come, first-served process appears to be the most equitable manner to allocate space. In general, we do not believe that a sufficient number of prospective interconnectors are likely to request interconnection in central offices with limited space at any one time to make lotteries a reasonable way to allocate space, and we are concerned that LECs could use a lottery process to delay fulfilling an early request for interconnection until a sufficient number of other requests were received to permit a lottery. LECs that qualify for exemptions to provide physical collocation in lieu of virtual collocation need not expand their facilities or relinquish space reasonably reserved for their future use, for the same reasons stated in the Special Access Expanded Interconnection Order.[124] We also reaffirm our conclusion that LEC tariffs may reasonably include provisions prohibiting interconnectors from warehousing central office space.[125]

2. Tariffing Requirements for Physical Collocation

73. In earlier orders in this proceeding, we held that the cross-connect element should be tariffed at a study-area-wide averaged rate under both virtual collocation and physical collocation. We concluded that cost differences among central offices may justify different charges for central office space, power, environmental conditioning, and labor and materials charges for installing physical collocation arrangements, but charges should be uniform for all interconnectors in each individual central office.[126] We now conclude, for the reasons given in our prior orders, that the same tariffing requirements should apply to physical collocation provided pursuant to exemption from the virtual collocation requirement.

C. Standards that Apply to Both Virtual Collocation and Physical Collocation

1. State Expanded Interconnection Policies

74. In our earlier orders, we allowed the LECs to apply for exemptions from the mandatory physical collocation requirement, and to provide virtual collocation instead, if the states in which they operated had adopted policies requiring LECs to offer intrastate expanded interconnection.[127] The state policy exemption from the physical collocation requirement does not apply under our mandatory virtual collocation policy. Of course, LECs operating in a state with an expanded interconnection policy that favors physical collocation may obtain an exemption from the interstate virtual collocation tariffing requirement by offering physical collocation subject to the terms set forth in this order.

75. We reaffirm our conclusion in the Special Access Expanded Interconnection Order that if a LEC offers both interstate and intrastate expanded interconnection, it should do so in a manner that satisfies both federal and state requirements to the extent possible, and should provide mechanisms to avoid double payment for facilities used for both interstate and intrastate collocation.[128] As we stated in the Special Access Expanded Interconnection Order, we believe that this requirement should reduce the potential for federal/state conflict and should prevent manipulation of different approaches to expanded interconnection to disadvantage unfairly interconnectors (i.e., requiring interconnectors to pay for different facilities for federal and state interconnection due to slightly differing requirements, when the same facilities could serve both purposes and satisfy both sets of requirements).

2. Reporting Requirements

---

[124] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7408, ¶ 79.

[125] Id., ¶ 80.

[126] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7441-43, ¶¶ 156-59; Second Reconsideration Order, 8 FCC Rcd at 7365-67, ¶¶ 56-59; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7421-22, ¶ 86.

[127] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7391, ¶ 41; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7393-94, ¶ 31.

[128] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7488-89, ¶¶ 254-55.

76. Orders/Background. We have required the BOCs and GTE to report biennially on the customers using special access expanded interconnection and the locations at which they are interconnected.[129] We have also required the BOCs and GTE to report annually on the customers using switched transport expanded interconnection and the locations at which they are interconnected.[130]

77. Positions of the Parties on Reconsideration. USTA takes issue with the reporting requirements applicable solely to the BOCs and GTE. USTA claims that these LECs have no unique ability to gather or provide the data and should not be treated differently from other competitors. Instead, USTA contends that the Commission should require all special access competitors to provide information regarding the growth of access competition.[131] GTE argues that interconnectors, rather than LECs, should be required to report on collocation as well as quantities of circuits, number and location of network nodes, and numbers of customers, to give the Commission data necessary to conduct a reasoned analysis of the extent of competition.[132]

78. ALTS and MCI respond that the existing requirement will assist in identifying possible discrimination, involves a minimal burden, and is appropriately imposed only on the LECs because it relates to the interconnection services they provide.[133] In addition, MCI argues that the BOCs should be required to file quarterly reports identifying the parties using expanded interconnection and the offices in which they are interconnected, in order to enforce the new restrictions it recommends imposing on interconnection by AT&T.[134] Sprint contends that the information that the LECs propose requiring -- the location of interconnection customers' network nodes and the number of their users -- is irrelevant to monitoring the development of local competition.[135] NARUC submits that the Commission should collect data on collocation expenses, revenues, and deployment activity to facilitate Joint Board decisionmaking.[136]

79. Discussion. We now conclude that a broader information collection program is necessary to monitor the development of access competition. The extent to which access competition develops is a significant gauge of the success of our expanded interconnection policy. In addition, the extent to which competition actually develops is an important factor in considering LEC requests for additional pricing flexibility in the future. The existing reporting requirements were designed to monitor the limited question of which customers are using expanded interconnection and at what locations they are interconnected. We conclude that a broader monitoring program is needed to gather empirical data that will better enable us to monitor the development of competition in interstate access markets. We delegate authority to the Chief, Common Carrier Bureau, to formulate the detailed elements of this reporting program, decide which carriers must provide information, and specify the format and timing of these reports.

3. Dispute Resolution

80. Orders/Background/Positions of the Parties on Reconsideration. We concluded in our initial order in this proceeding that existing dispute resolution procedures -- our standard tariff and complaint processes, as well as our new alternative dispute resolution mechanisms[137] -- are adequate to

---

[129] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7492, ¶ 263.

[130] Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7444, ¶ 142.

[131] USTA Special Petition at 29-30; USTA Special Reply at 10; see also NYNEX Special Opposition at 12-13.

[132] GTE Special Petition at 30-31; GTE Special Reply at 6-7; GTE Switched Petition at 17-18.

[133] ALTS Special Opposition at 15-16; MCI Special Opposition at 12-13 (also noting that it does not object to requiring submission of additional useful information by the CAPs).

[134] MCI Special Petition at 10. See supra ¶ 37 for a description of the restrictions MCI proposes.

[135] Sprint Special Opposition at 10.

[136] NARUC Special Petition at 23.

[137] Use of Alternative Dispute Resolution Procedures in Proceedings Before the Commission in Which the Commission is Not a Party, GC Docket No. 91-119, Initial Policy Statement and Order, 6 FCC Rcd 5669 (1991); Notice of Proposed Rulemaking and Second Notice of Inquiry, 7 FCC Rcd 2874 (1992);

resolve disagreements regarding the implementation of expanded interconnection.[138] MFS argues that the Commission should delegate authority to specific staff members to facilitate expeditious, informal, and binding resolution of implementation disputes.[139] The LECs respond that MFS's request unjustifiedly presupposes bad faith on behalf of the LECs, would unnecessarily tax the Commission's scarce resources, and could discourage negotiated resolution and encourage parties to resort to the FCC to settle disputes.[140]

81. Discussion. We recognize that the implementation of mandatory virtual collocation carries with it the potential for more disputes than arose under the physical collocation regime. In particular, disagreements could arise regarding the installation, maintenance, and repair of the virtually collocated central office electronic equipment that terminates interconnectors' circuits. We encourage LECs and interconnectors to work together to resolve these disputes amicably. In cases that the parties are unable to resolve, however, special dispute resolution mechanisms could expedite the resolution of these disagreements and could help ensure that our new expanded interconnection regime works smoothly. We delegate to the Chief, Common Carrier Bureau, authority to develop special dispute resolution mechanisms, possibly including the designation of a Commission representative to work personally with the parties to mediate disputes and ensure that they are settled expeditiously, fairly, and consistently.

4. Interconnection to LEC Facilities

a. Microwave

82. Orders/Background. The Special Access Expanded Interconnection Order required LECs to permit interconnection with microwave transmission facilities where reasonably feasible.[141] The Common Carrier Bureau granted LECs a waiver of this tariffing requirement to permit microwave expanded interconnection to be tariffed on an individual case basis (ICB) in response to bona fide requests.[142] The Commission adopted the same approach for microwave switched transport interconnection in the Switched Transport Expanded Interconnection Order, pending resolution of the issue on reconsideration of the Special Access Expanded Interconnection Order.[143]

83. Positions of the Parties on Reconsideration. USTA and GTE seek clarification that microwave collocation "where reasonably feasible" must be tariffed only through an office-specific bona fide request process, and only in central offices in which there are no safety or engineering risks and the costs are not unreasonable.[144] API responds that interconnection by microwave transmission facilities will be the principal cost-effective means for sophisticated end users to obtain expanded interconnection, particularly in low-density rural areas, and argues that the LECs should be directed to make every reasonable effort to accommodate requests for microwave interconnection arrangements.[145]

84. Discussion. We agree with the Bureau's conclusion that microwave interconnection must be so tailored to specific interconnectors and to particular central offices that it does not readily lend itself to uniform tariff arrangements.[146] We therefore modify our requirements to specify that the LECs must tariff microwave interconnection on a central office-specific, individual case basis, in response to bona fide requests. Such tariffed arrangements must be made available to other similarly situated parties at the same central office on non-discriminatory terms, and must be

---

47 C.F.R. § 1.18.

[138] See Special Access Expanded Interconnection Order, 7 FCC Rcd at 7493, ¶ 266.

[139] MFS Special Petition at 18-19.

[140] Ameritech Special Opposition at 11-12; NYNEX Special Opposition at 7-9.

[141] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7416, ¶ 98.

[142] Ameritech Operating Companies, 8 FCC Rcd at 4603, ¶¶ 78-79 (Com. Car. Bur. 1993).

[143] Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7415, ¶ 68.

[144] USTA Special Petition at 23-25; GTE Special Petition at 31-33; USTA Special Reply at 7-8.

[145] API Special Opposition at 7-9; see GTE Special Reply at 8 (stating that it stands ready to work cooperatively with parties desiring microwave interconnection).

[146] Ameritech Operating Companies, 8 FCC Rcd at 4603, ¶¶ 78-79 (Com. Car. Bur. 1993).

offered under general tariff at a given central office if the LECs gain sufficient experience to do so and if such arrangements can reasonably be standardized.[147] Microwave interconnection should be offered through virtual collocation (using microwave transmission equipment that is owned by the LEC and dedicated to the interconnector's exclusive use) or, if the LEC wishes to qualify for an exemption, through physical collocation. We expect the LECs to make reasonable efforts to accommodate requests for microwave interconnection arrangements. Of course, the LECs may charge rates that reasonably recover the costs of offering such arrangements.

b. Copper or Coaxial Cable

85. Orders/Background. Because the interconnection of copper or coaxial cable could rapidly exhaust available conduit and riser space, we held in our earlier orders that interconnection of such cable facilities is permitted in specific cases only upon the approval of the Common Carrier Bureau.[148]

86. Positions of the Parties on Reconsideration. Penn Access argues that interconnectors should be able to use coaxial cable facilities for interconnection. It asserts that contrary to the Commission's conclusion, interconnection with coaxial cable can use space more efficiently and require less maintenance than fiber because it eliminates the need for interconnector optical terminals and electronic equipment on LEC premises.[149] Penn Access adds that small- to medium-sized CAPs in particular can avoid unnecessary costs by using coaxial cable when they have lower capacity needs.[150] Penn Access suggests that rather than placing a burden on coaxial interconnectors to make a showing to the Bureau, the LECs, which have more information and monopoly power, should have the burden of showing that a specific coaxial interconnection would significantly limit conduit or riser space.[151]

87. The LECs respond that coaxial cable is not widely favored by communications providers, is becoming less prevalent throughout the industry, and would consume entrance space and user ducts far more rapidly than fiber due to differences in capacity and the larger physical diameter of coaxial cable. They contend that coaxial cable interconnection is costly and could crowd out fiber interconnection and force LECs to reconfigure central offices, potentially leaving LECs with an unusable investment when interconnectors change over to fiber.[152] WilTel, concerned about interconnection by AT&T, recommends prohibiting interconnection with copper coaxial cable without Commission approval.[153]

88. Discussion. We reaffirm our decision that interconnection of copper or coaxial cable facilities will be permitted in specific cases only upon approval by the Common Carrier Bureau. Copper and coaxial cables use conduit space much less efficiently than fiber. We remain concerned that if, under virtual collocation or physical collocation arrangements, interconnectors request that such cable be brought into LEC central offices, conduit or riser space might quickly be exhausted, which could impair the LECs' ability to serve their other customers or subsequent interconnectors. Most cable television companies (and other parties with substantial amounts of copper or coaxial cable in their networks) do not interconnect with the LECs at present and will have to install new facilities to establish collocated interconnection at LEC central offices. We believe it is in the public interest to encourage them to deploy fiber in making such interconnections in order to promote efficient use of available conduit and riser space and thereby facilitate access to central office interconnection by the greatest number of potential interconnectors. We also clarify that the restriction on interconnecting copper or coaxial cable refers to the interconnector's facilities, and does not restrict the type of LEC services to which inter-

---

147 See supra ¶ 34.

148 Special Access Expanded Interconnection Order, 7 FCC Rcd at 7416, ¶ 99; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7415-16, ¶ 69.

149 Penn Access Special Petition at 3-7, Attachment B (stating that a 1 1/4 inch innerduct can house 19 coaxial cables).

150 Penn Access Special Reply at 2-10.

151 Penn Access Special Petition at 7-8.

152 USTA Special Opposition at 21-22; Ameritech Special Opposition at 8-9 (noting that a one-inch coaxial cable could accommodate up to 16 DS3s, while a one-inch fiber cable could accommodate over 1,000 DS3s); GTE Special Opposition at 15-17 (noting that at least four fiber cables are typically put in the same duct and riser space occupied by one or two coaxial cables).

153 WilTel Special Petition at 14-15.

connectors are entitled to connect.

c. DS0 and Other Special Access Services

89. Orders/Background. In the Special Access Expanded Interconnection Order, we required the LECs initially to tariff interconnection to DS1 and DS3 services generally. We required the LECs to file tariffs within 45 days of bona fide requests for interconnection to other special access services. Such tariff revisions are to be filed on 45 days notice.[154]

90. Positions of the Parties on Reconsideration. Teleport submits that interconnection at the DS0 level should be generally tariffed like DS1 and DS3 interconnection. Teleport argues that this would enable interconnectors to provide their own multiplexing from high-capacity levels down to the DS0 level, rather than handing off DS1 circuits to the LECs and being dependent on (allegedly often overpriced) LEC multiplexing to obtain access to DS0 level circuits. Teleport contends that this would give CAPs more control over the speed of provisioning and service quality to their DS0 customers, and would facilitate greater competition for DS0 services.[155] The LECs, on the other hand, contend that universal tariffing of DS0 interconnection is unnecessary, would impose inefficiencies on LECs by requiring them to bypass their own multiplexers and route large quantities of cable through their buildings to terminate at interconnectors' multiplexers, and might require LECs to equip central offices with facilities for which there is no present demand.[156]

91. GTE seeks clarification that cross-connect elements for DS1, DS3, and other services should be tariffed only if the LEC's corresponding special access service is available in a specific office.[157] MFS agrees, but states that the LEC should be required to permit interconnectors to cross-connect to any special access service offered out of a specific office.[158] ALTS, however, contends that this LEC argument amounts to an effort to limit artificially CAP innovation.[159]

92. GTE argues that the 45 day deadline for filing tariffs for the interconnection of services other than DS1 and DS3 is too short given the detailed engineering and costing activities necessary, and contends that it is unlikely that any interconnector could design and build transmission facilities to a central office in 45 days or less so that a reasonable extension would not delay interconnection in practice.[160] MFS argues that these tariffs are unlikely to be particularly complex and that 45 days should be more than sufficient.[161]

93. Discussion. We believe that interconnection to the broadest array of special access services is in the public interest because it facilitates competition for all these services. The initial tariffing requirement was limited to DS1 and DS3 services only to promote rapid implementation, because these are the services that we believed interconnectors desired most and for which competition would be most likely to develop in the short term. We conclude that, under our new rules, the LECs must provide interconnection to DS0 and all other special access services within 45 days of receiving a bona fide request for such a service. We conclude that more time is unnecessary and could impede competition, thereby unnecessarily delaying service to customers. Our expanded interconnection policies do not require a LEC to connect interconnectors' facilities with any given LEC service (e.g., DS3 service) at a particular central office if the LEC does not offer that service at that central office.

5. Other Standards Issues

94. Equipment in LEC Central Offices. In our earlier orders, we required LECs to permit interconnectors to place, or designate for placement, in LEC central offices only equipment needed to terminate basic transmission facilities,

---

[154] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7489-90, ¶ 259 & n.603.

[155] Teleport Special Petition at 19-20; Teleport Special Reply at 7-9.

[156] United Special Opposition at 13-14; USTA Special Opposition at 22.

[157] GTE Special Petition at 33-34; GTE Special Reply at 7-8. Accord, USTA Special Reply at 9-10.

[158] MFS Special Opposition at 23.

[159] ALTS Special Opposition at 17 n.36.

[160] GTE Special Petition at 33; GTE Special Reply at 8.

[161] MFS Special Opposition at 24.

including optical line terminating equipment and multiplexers. We concluded that the placement or dedication of other types of equipment, such as enhanced service equipment, in LEC central offices was unnecessary to foster competition in the provision of special access and switched transport services, and consequently we did not require the LECs to permit the collocation of such equipment in their central offices.[162] We conclude that the same principles should apply under the mandatory virtual collocation and physical collocation exemption policies we adopt in this order, for the reasons stated in our previous orders. Only central office equipment needed to terminate basic transmission facilities must be collocated pursuant to this order.

95. Points of Entry. In our earlier orders, we required the LECs to offer interconnectors at least two separate points of entry to each central office if they have at least two entry points for their own cable.[163] USTA and GTE contend that the requirement should apply only when there is space available for new facilities at each of two points entering the central office, and that LECs should not be required to construct new entry points or reroute their own facilities to accommodate interconnectors.[164] MFS responds that LECs should be required to rearrange facilities or take other reasonable steps (short of installing new cable entrances) to provide diverse cable entrances upon an interconnector's request.[165] Under our new regime, we reaffirm the general requirement, but make the modification requested by USTA and GTE. We conclude that this revision reasonably advances our policy objective of ensuring that in most cases interconnectors desiring reliability can obtain diverse entry points, while avoiding undue burdens on the LECs.

96. Network Reliability Council. GTE submits that the Commission should not let expanded interconnection proceed until the Network Reliability Council has developed standards and operational safeguards to ensure that network reliability is not compromised.[166] We decline to adopt GTE's suggestion under our new regime. The Network Reliability Council has not been delegated responsibility for developing specific technical guidelines. We reaffirm our conclusion that LECs are permitted to proscribe use of interconnector equipment or operating practices that would constitute a significant and demonstrable technical threat to LEC networks.[167]

97. Insurance. MFS suggests that a LEC tariff requirement that an interconnector obtain $1 million in comprehensive general liability insurance should be presumed reasonable, and any more burdensome insurance requirement should be allowed only if the LEC provides specific factual justification for it.[168] The LECs respond that such a rule would be unprecedented, unnecessary, and overly intrusive into LEC property management.[169] NYNEX points out that liability insurance requirements will reasonably differ in different parts of the country and in different types of central office buildings, and contends that a $1 million policy would almost always prove inadequate because a central office fire or other casualty caused by an interconnector's negligence could easily result in far more than $1 million in damage.[170] We reaffirm our conclusion that resolution of insurance issues is best addressed when we examine the reasonableness of specific LEC physical collocation tariff provisions.[171] We add, however, that unless a LEC makes a compelling case to the contrary, in general no liability insurance requirements should be imposed in

---

[162] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7413-14, ¶¶ 93-94; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7412-13, ¶ 63.

[163] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7411-12, ¶ 89; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7410-11, ¶ 60. See also Ameritech Operating Companies, CC Docket No. 93-162, 8 FCC Rcd 4589, 4605, ¶ 91 (Com. Car. Bur. 1993) (waiving application of this requirement when all entry points but one are at capacity).

[164] USTA Special Petition at 26; GTE Special Petition at 35; USTA Special Reply at 8-9.

[165] MFS Special Opposition at 24.

[166] GTE Special Petition at 26-27.

[167] See Special Access Expanded Interconnection Order, 7 FCC Rcd at 7392, n.101.

[168] MFS Special Petition at 20-21.

[169] USTA Special Opposition at 18-19.

[170] NYNEX Special Opposition at 10.

[171] See Special Access Expanded Interconnection Order, 7 FCC Rcd at 7407, ¶ 77 n.189.

connection with virtual collocation offerings.

98. Customer Proprietary Network Information (CPNI). MFS argues that the Commission should impose CPNI protection rules on expanded interconnection arrangements to prevent LECs from using their control of bottleneck facilities to obtain unfair competitive advantages.[172] The LECs respond that CPNI rules are unnecessary because any competitor can easily identify potential access service customers, and contends that such rules would split LEC staffs into subgroups that are likely to be less efficient and perform redundant work, and could not be implemented at all due to the limited staff in many smaller business offices.[173] We are persuaded by the LECs' arguments on this point, and conclude that no special CPNI protection rules are necessary in the context of our new expanded interconnection regime.[174]

99. Billing. In the Switched Transport Expanded Interconnection Order, we decided that the LECs should bill the interconnection charge to the customer of record, whether that party is a CAP or an IXC, even in cases where a CAP aggregates the traffic of several IXCs and the CAP is the customer of record.[175] Rochester seeks clarification that it may bill the transport interconnection charge and other switched access elements to the entity whose traffic it can measure, in circumstances where it cannot bill the customer of record. Rochester states that this may occur when a CAP aggregates the traffic of several IXCs, the CAP is the customer of record, and the carrier identification codes are associated with the IXCs.[176] MFS supports Rochester's petition, stating that the procedure Rochester proposes is technically unavoidable and permits the charges to be billed to the actual underlying user of switched access services.[177] Sprint opposes Rochester's proposed clarification, arguing that the customer of record should be billed, but states that it would not object to a waiver for Rochester limited to the circumstances described in its petition.[178] We will not issue Rochester's proposed clarification, because Rochester has presented no evidence persuading us that our decision in the Switched Transport Expanded Interconnection Order was incorrect or unworkable, and we reaffirm that decision. We concluded that billing the customer of record would enable the LECs to measure interstate minutes of use accurately and bill the charge to the appropriate party. The LEC, of course, must be able to bill for the services it provides to its customers, and we will consider granting waivers in circumstances meeting the normal waiver standard.[179]

100. Percentage of Interstate Use (PIU) Reporting. In the Switched Transport Expanded Interconnection Order, we concluded that in cases in which IXCs are able to report end users' PIU data, LECs may, in their tariffs, require them to do so.[180] Sprint submits that end users that are expanded interconnection customers of record -- not the IXCs serving those users -- should report their own PIU data to LECs. Sprint argues that requiring IXCs to report PIU data to LECs when the customer of record is an end user places an unwarranted and impractical burden on IXCs, because end users often split their traffic among several IXCs, and IXCs may not be able to segregate any particular user's traffic for the purposes of PIU measurement.[181] No party opposes Sprint's request. We reaffirm our decision in our earlier orders. If IXCs cannot accurately report end users' PIU data, it would be reasonable for LECs to require the end user

---

[172] MFS Special Petition at 17.

[173] Ameritech Special Opposition at 14-15; Bell Atlantic Special Opposition at 9; USTA Special Opposition at 23.

[174] See Special Access Expanded Interconnection Order, 7 FCC Rcd at 7418, ¶ 104 n.245.

[175] Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7441-42, ¶¶ 133-34.

[176] Rochester Switched Petition at 8-10; Rochester Switched Reply at 6.

[177] MFS Switched Opposition at 6.

[178] Sprint Switched Opposition at 5.

[179] In general, to qualify for a waiver, a party must demonstrate that enforcement of a generally applicable rule would not be in the public interest in the special circumstances under consideration. Northeast Cellular Tel. Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990); WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969); 47 C.F.R. § 1.3.

[180] Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7443, ¶ 137.

[181] Sprint Switched Petition at 13.

customer of record to report its PIU to the LEC. LECs may use the same PIU verification procedures for end user access customers that they now use for IXC customers.

101. Collocation of Data-Over-Voice (DOV) Equipment. The Special Access Expanded Interconnection Order and the Switched Transport Expanded Interconnection Order required LECs to permit interconnectors laying their own circuit facilities to a LEC central office to collocate any type of basic transmission equipment, including data-over-voice (DOV) equipment, but not switches or enhanced service equipment.[182] USTA and GTE argue that LECs should not be required to allow collocation of DOV equipment, because they assert that DOV equipment is not used to provide a basic transmission service in conjunction with interstate special access service (i.e., as a substitute for LEC channel terminations). Instead, USTA and GTE contend that DOV equipment is generally used in conjunction with switched service between copper-based local loops and split voice and data ports in the LECs' local switches, and constitutes "equipment to be interconnected with LEC-provided transmission facilities" and not included in the scope of expanded interconnection.[183] IDCMA and ITAA respond that DOV is basic transmission equipment and note that several LECs offer tariffed services using such equipment. They assert that interconnectors could use DOV equipment in connection with special access services without connecting to the loop side of LEC switches and argue that GTE's and USTA's proposed restriction would be anticompetitive.[184] We reaffirm our conclusion that because DOV equipment is basic transmission equipment, expanded interconnection customers have a right to virtual collocation of DOV equipment in LEC central offices (or physical collocation for LECs that qualify for exemptions from the virtual collocation requirement). We clarify, however, that we have not required the LECs to unbundle their loop-side switched access common line services.

V. AVAILABILITY OF EXPANDED INTERCONNECTION

A. Parties that Offer Expanded Interconnection: Reciprocity

102. Orders/Background. In our prior orders in this proceeding, we required all Tier 1 LECs, except NECA pool members, to provide expanded interconnection, but did not impose reciprocal obligations on interconnectors.[185]

103. Positions of the Parties on Reconsideration. GTE and USTA contend that the Commission should require at least those common carriers that seek expanded interconnection to offer expanded interconnection themselves on equivalent terms, as MFS had originally proposed. GTE and USTA submit that reciprocity would help facilitate a level playing field between competing carriers, particularly given the policymakers' goal of a "network of networks" in which LECs may wish to obtain fiber from CAPs or others, and given the evolution of special arrangements between CAPs, cable television operators, IXCs, and others.[186]

104. MCI, Sprint, and AT&T oppose requiring reciprocal interconnection obligations, because the LECs, which possess bottleneck facilities, do not need access to interconnector facilities to provide their services.[187] MFS states that it is amenable to providing collocation or equivalent interconnection to LECs upon request, as long as other common carriers using expanded interconnection (but not end-users) are subject to similar obligations, but adds that because it controls no bottleneck facilities, there is no need for the Commission to require reciprocal interconnection

---

[182] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7413-14, ¶¶ 93-94 & n.224; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7412-13, ¶ 63.

[183] GTE Special Petition at 27-28; USTA Special Petition at 26-27; USTA Special Reply at 6; GTE Special Reply at 5-6. Accord, NYNEX Special Opposition at 14-15.

[184] IDCMA Special Opposition at 2-7; ITAA Special Opposition at 4-6.

[185] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7398-99, 7403 n.167, ¶¶ 56-58, 65 n.167; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7399-7400, ¶ 40.

[186] GTE Special Petition at 24-26; USTA Special Petition at 27-29; USTA Switched Petition at 10; USTA Switched Reply at 5-6.

[187] MCI Special Opposition at 11-12; Sprint Special Opposition at 9-10; Sprint Switched Opposition at 5; AT&T Switched Opposition at 2 n.2.

rights.[188]

105. Discussion. Section 201(a) of the Act already requires CAPs and other common carriers to provide interconnections with other common carriers upon request. We conclude that this general requirement is sufficient with respect to parties other than LECs, and that our detailed mandatory virtual collocation rules should apply only to the Tier 1 LECs other than NECA pool members. First, mandated expanded interconnection for parties other than LECs is beyond the scope of this proceeding, because we did not propose in either of the notices in this proceeding to impose interconnection obligations on parties other than the LECs. Second, mandated expanded interconnection requirements are necessary because the LECs are dominant carriers and control facilities to which other parties need access in order to provide service. In the absence of any other identified public interest benefits in mandating reciprocity, we find no reason to impose expanded interconnection requirements on parties that lack market power and do not control bottleneck facilities. MFS has indicated that it is willing to provide interconnection to its facilities voluntarily, and we believe that market forces are likely to induce other non-dominant interconnectors to do so to meet demand as well.

B. Parties that May Use Expanded Interconnection

106. Orders/Background. Currently, all parties, including CAPs, IXCs, and end users, can make use of expanded interconnection. We concluded in our earlier orders that AT&T and any other parties already located in the same building as a LEC central office could use expanded interconnection to interconnect with LEC facilities in the same manner, and at the same charges, as other parties.[189]

1. Restrictions on AT&T

107. Positions of the Parties on Reconsideration. MCI contends that AT&T can derive unique, unfair advantages from expanded interconnection using its collocated points of presence (POPs) that result from its historical relationship with the BOCs. MCI provides examples of ways it alleges AT&T could use interconnection arrangements to cut its access costs by over 90% in many cases.[190] MCI recommends that AT&T be required to continue paying channel termination charges in central offices where it currently has POPs until another party is taking expanded interconnection service in that office, although MCI does not object to AT&T obtaining expanded interconnection immediately in offices in which it did not have pre-existing collocated POPs.[191] WilTel and CompTel argue that AT&T possesses monopsony power, and could use that power to gain windfall benefits from interconnection. They contend that AT&T may be the only IXC that can benefit from interconnection. They thus assert that AT&T should not become eligible for collocation pricing unless it installs an optical interface, and recommend prohibiting interconnection with copper coaxial cable without Commission approval.[192] WilTel submits a quantitative analysis purporting to show that, given the LECs' rates for physical collocation, an IXC or CAP located 1/2 mile from a central office could justify interconnecting only if it has enough traffic to fill at least 24 DS3s, while only 12 DS3s of traffic would be needed to justify physical collocation for an IXC whose POP is at the central office.[193]

108. AT&T responds that these arguments amount to attempts by its competitors to obtain advantages through the regulatory process, and asserts that by requiring AT&T to pay the same charges and use the same interconnection architecture as other interconnectors, the orders already eliminate any

---

[188] MFS Special Opposition at 21-22; MFS Switched Opposition at 6-7.

[189] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7403-04, ¶¶ 65-68; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7402, ¶ 44.

[190] MCI Special Petition at 3-9; MCI Switched Petition at 4-5; MCI Switched Reply at 6-7.

[191] MCI Special Petition at 9-11, 13-14; MCI Special Reply at 2-7; accord, CompTel Special Opposition at 6-8; Sprint Special Opposition at 10-11; WilTel Special Opposition at 15-17 (arguing that AT&T should not receive price reductions until a CAP is interconnected).

[192] WilTel Special Petition at 3-4, 14-15; WilTel Special Reply at 8-9; WilTel Switched Reply at 7-10; CompTel Special Opposition at 6-8.

[193] WilTel Switched Petition at 9-11.

possible advantages it may have.[194] GTE asserts that LEC pricing should not depend on the identity of an interconnecting party, and that such distinctions may not be consistent with Section 202 of the Communications Act.[195]

109. Discussion. In the context of our mandatory virtual collocation policy, we reaffirm our conclusion that AT&T may use expanded interconnection, and that if it does so, it must deploy the same facilities and pay the same charges as any other interconnector.[196] Restricting AT&T's ability to use expanded interconnection would impede the ability of the largest potential access competitor to the LECs to enter the market, which would not be in the public interest. Moreover, imposing such a restriction on AT&T would not promote cost-based interexchange competition. To the extent AT&T has any advantage over other IXCs because it has a larger number of POPs in closer proximity to LEC central offices, this advantage is offset by the added capital costs that AT&T incurred to deploy these facilities and the additional operating expenses that they cause. Finally, such a restriction could remove an important market check on above-cost pricing by the Tier 1 LECs in rural areas, where AT&T may be the only party that could compete with LEC access services in the foreseeable future.

110. We are unconvinced by the non-dominant IXCs' arguments. In particular, WilTel has offered insufficient information to assess the validity of the assumptions underlying its quantitative analysis. Moreover, WilTel's analysis does not appear to take into account the internal network costs of the party located at the LEC central office (such as the costs of constructing and maintaining additional transmission facilities to reach the central office), as opposed to those of parties located 1/2 mile from the LEC central office, which should offset at least some of that party's benefits. Contrary to MCI's suggestions, AT&T cannot simply pay cross-connect charges instead of channel termination charges; if AT&T uses expanded interconnection, it must pay for and use the same collocation arrangements that other interconnectors use. In any case, for the policy reasons given above, we reaffirm our existing rules relating to AT&T's use of expanded interconnection.

2. Restrictions on End Users

111. USTA submits that there is no need to make collocation available to non-common carriers to avoid unreasonable discrimination, because Section 201(a) explicitly distinguishes carriers from others for interconnection purposes, and the Commission need not prejudge LECs' methods for responding to discrimination concerns.[197] We are unconvinced by USTA's argument, and reaffirm our decision that all parties, including non-common carriers, may use expanded interconnection offerings -- an approach that is consistent with our policy of not distinguishing between carriers and users in the application of access charges.[198]

VI. EXPANDED INTERCONNECTION RATE STRUCTURE AND PRICING

A. Connection Charge Rate Structure

112. Orders/Background. Connection charges are the rates that LECs assess interconnectors for the provision of expanded interconnection services. In our earlier Expanded Interconnection decisions, we did not impose detailed rate structure requirements for connection charges, but did require that the connection charge rate structures that the LECs use reflect cost-causation principles, and be unbundled to ensure that interconnectors are not forced to pay for services that they do not need.[199]

113. Positions of the Parties on Reconsideration. In comments filed before the adoption of the Second Reconsideration Order, which mandated unbundling of expanded interconnection rate structures, WilTel asserted that to prevent discrimination with respect to individually negotiated virtual collocation offerings, LECs should be required to unbundle all rate elements for such offerings to the

---

194 AT&T Special Opposition at 2-6; AT&T Switched Opposition at 2-6.

195 GTE Special Reply at 3.

196 Special Access Expanded Interconnection Order, 7 FCC Rcd at 7403-04, ¶¶ 65-68; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7402, ¶ 44.

197 USTA Special Petition at 6.

198 See supra ¶ 19 and authorities cited therein.

199 Second Reconsideration Order, 8 FCC Rcd at 7368, ¶ 61; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7417-18, ¶¶ 72-75.

maximum extent possible and should be permitted to offer volume discounts only when justified by technology.[200] WilTel also submits that maximum unbundling could enable the Commission to ensure that virtual collocation offerings are priced consistently with physical collocation, and argues for pricing virtual collocation using physical collocation rates as a starting point, and then deducting the cost savings resulting from using a virtual arrangement.[201] Ameritech contends that virtual and physical collocation will be different services, and terms and conditions will justifiably differ.[202]

114. Discussion. In light of our decision to impose a mandatory virtual collocation requirement, and based on the record on reconsideration, we reaffirm and expand our requirements regarding the rate structure of connection charges. We conclude that we should not at this time impose a detailed rate structure for connection charges under our mandatory virtual collocation regime. For the reasons set forth in our earlier orders,[203] we conclude that such a structure could be overly inflexible. We have found in our experience in the ongoing investigation of the LECs' expanded interconnection tariffs,[204] however, that the use of disparate rate structures can complicate the ability of interested parties and our staff to evaluate the reasonableness of LEC rate structures and levels. Thus, we conclude that additional guidance could facilitate the tariff review process, and we set forth additional requirements to guide the LECs' choice of expanded interconnection rate structures.

115. First, we reaffirm for our new regime the rate structure principles adopted in the Second Reconsideration Order and the Switched Transport Expanded Interconnection Order, for the reasons stated in those orders.[205] Thus, we require the LECs to establish reasonable, disaggregated subelements for connection charges pursuant to rate structures that (1) reflect cost-causation principles, (2) are unbundled to ensure that interconnectors are not forced to pay for services that they do not need, and (3) establish a cross-connect element that applies uniformly to both physical and virtual collocation.

116. In addition, the LECs' rate structures must be clear and easy to understand. Regardless of a LEC's individual choice of rate structure, the facilities and services provided under each rate element should be clear on the face of the tariff, and the tariff support information should identify the specific costs that are recovered by each rate element. In addition, each rate element should logically relate to the service function provided under that rate element. For example, one of the basic functions of virtual collocation service is the provision of a cable running from the point of interconnection of the LEC's and interconnector's networks to the termination equipment in the LEC's central office. An entrance cable rate element, therefore, would logically recover the costs of cable running between these two locations.

117. Finally, we will require the LECs to provide cost support data for their September 1, 1994 virtual collocation tariff filings pursuant to a uniform Tariff Review Plan (TRP) format established by the Common Carrier Bureau. The TRP will disaggregate expanded interconnection service into broad categories, or "functions." For example, one TRP function might be the entrance cable function described above. Provision of basic cost data by TRP function permits Commission staff and the interested public to compare the LECs' various rate structures and levels more effectively. We delegate authority to the Chief, Common Carrier Bureau, to promulgate detailed requirements regarding the TRP format in a separate order.

B. Connection Charge Pricing

118. Orders/Background. In the earlier Expanded Interconnection orders, we concluded that LECs should recover the costs of providing expanded interconnection services through new connection charge elements. We required the LECs to set the initial rates for connection charges for expanded

---

200 WilTel Special Petition at 7-10.

201 WilTel Special Petition at 11-13.

202 Ameritech Special Opposition at 15.

203 Special Access Expanded Interconnection Order, 7 FCC Rcd at 7425-26, ¶ 121; Second Reconsideration Order, 8 FCC Rcd at 7368, ¶ 61; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7417-18, ¶¶ 72-75.

204 See supra note 14.

205 Second Reconsideration Order, 8 FCC Rcd at 7368, ¶ 61; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7417-18, ¶¶ 72-75.

interconnection based on direct costs plus a reasonable share of overhead loadings. We required the LECs to derive direct costs using a consistent methodology, and to justify any deviation from uniform overhead loadings that they propose for connection charges. The same cost justification standards apply to both initial rate levels and subsequent rate changes for connection charges.[206]

119. Positions of the Parties on Reconsideration. ALTS requests clarification of the pricing standard to be used to justify connection charge elements, arguing that there are disparities between the application of overhead loadings to connection charges and to rates for services subject to competition, and that such differences are anti-competitive and should be eliminated.[207] ALTS argues that the current pricing standard enables the LECs to charge exorbitant rates for expanded interconnection and engage in a classic cost/price squeeze that stifles competition.[208] The LECs respond that they must be able to recover real overhead costs in their rates.[209]

120. Positions of the Parties in Recent Filings. The CAPs complain that the LECs have imposed excessive charges for equipment under their current virtual collocation tariffs.[210] The CAPs propose that the LECs should be required to purchase equipment from interconnectors at $1 or other nominal amount, giving interconnectors the right of first refusal to buy back the equipment at any time for the same price. Under this approach, the CAPs assert that the LECs would have no capital investment in equipment, and therefore would be prohibited from marking up their costs to reflect depreciation, the cost of money, or ad valorem taxes.[211]

121. Discussion. We continue to believe that the LECs must cost-justify the rate levels for connection charges, and that these rate levels must receive careful scrutiny by Commission staff. The same scrutiny will be required for both initial rate levels and subsequent rate changes in connection charges assessed both by price cap LECs and by rate-of-return LECs. We also reaffirm that expanded interconnection services covered by connection charges will be excluded from the LECs' price cap baskets indefinitely and are subject to non-streamlined tariff review.[212] We are making some changes to our pricing rules, however, in light of our adoption of a mandatory virtual collocation regime and our experience in reviewing the expanded interconnection tariffs filed under the existing rules. The LECs' cost-justified rates will be derived from the direct costs of providing expanded interconnection service plus a reasonable amount of overhead costs. We address these two types of costs in turn.

122. Direct Costs. We reaffirm that price cap LECs must derive the direct costs of expanded interconnection offerings as provided under the price cap new services test. Rate of return LECs that provide expanded interconnection should provide the cost information required for new services under the applicable sections of our rules.[213] Thus, under our new mandatory virtual collocation policy, the LECs must justify the direct costs related to all services covered by connection charges (including those related to physical collocation provided pursuant to an exemption), for both the initial level of these charges and subsequent changes. Specifically, we require the price cap LECs to derive the direct cost of providing similar types of new offerings, including expanded interconnection services covered by the connection charge rate elements, based on consistent methodologies, unless they can justify

---

206 Special Access Expanded Interconnection Order, 7 FCC Rcd at 7428-33, ¶¶ 127-131, 136-37; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7419-21, ¶¶ 79-81, 83.

207 ALTS Special Petition at 19-20.

208 ALTS Switched Petition at 13-15.

209 USTA Special Opposition at 5; United Special Opposition at 15-16.

210 MFS Ex Parte (July 5, 1994) at 7-12.

211 MFS Ex Parte (July 5, 1994) at 21-22; Electric Lightwave, Inc. Ex Parte (July 7, 1994) at 3; Intermedia Communications of Florida, Inc. Ex Parte (July 6, 1994) at 2-3.

212 47 C.F.R. § 61.42(f). See Special Access Expanded Interconnection Order, 7 FCC Rcd at 7432-33, ¶¶ 136-37; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7420-21, ¶ 83.

213 47 C.F.R. §§ 61.38 or 61.39.

different methodologies.[214] This requirement reflects our policy for the pricing of new services adopted in the LEC Price Cap proceeding.[215] As noted in our earlier expanded interconnection orders, however, certain aspects of the new services test, such as risk premiums, are not applicable to expanded interconnection services.[216]

123. The LECs' rates for virtual collocation services involving the central office equipment dedicated to the use of interconnectors are likely to be the most expensive rate elements in virtual collocation offerings. The purchase price of the equipment used to provide these services will, of course, be an important factor in computing the LECs' cost-based rates for these services, and we recognize that there will be different purchase prices for different types of equipment designated by interconnectors. We therefore require the LECs to include in their September 1 tariff filings a description of the methodology they use to compute their rates for services that require the use of optical line terminating multiplexers (OLTMs), and other equipment used to terminate, multiplex, and demultiplex circuits, based on the purchase prices of the equipment. This will ensure that the rates paid by all interconnectors are derived in the same manner, and will enable interconnectors that wish to offer to sell equipment to the LECs, or to designate equipment not previously tariffed, to predict their charges for the services that rely on the use of this equipment. The LECs' methodologies must be consistent with all the rate structure and pricing rules set forth in this order. In addition, the LECs must specify in their tariffs the actual charges for the equipment, calculated using the general methodology.

124. We are concerned about the reasonableness of the purchase prices of central office virtual collocation equipment, as the rates for services involving use of this equipment will be based on those purchase prices. For instance, LECs purchasing equipment that they do not ordinarily use in their networks may not be able to obtain the volume discounts available to interconnectors that regularly use such equipment in their networks. More importantly, in purchasing equipment, LECs do not have an incentive to obtain the lowest possible price, since their costs will be passed on to their competitors, the interconnectors. To counter this problem, we impose the following requirement on LEC pricing of OLTMs and other equipment with similar functions used in virtual collocation arrangements. LECs must base the direct costs of providing this equipment on the lowest purchase price reasonably available to them to serve an interconnector. In applying this standard, we would find probative the price at which an interconnector may offer to sell the desired equipment to the LEC. Any costs incurred above the lowest reasonably available price are not prudently incurred, and thus should not be reflected in the LECs' rates. The LECs, however, are not required to purchase the equipment from interconnectors.

125. This pricing approach will help ensure that LEC rates for use of this virtual collocation equipment will be reasonable, and will limit the LECs' ability to pay inflated prices and pass them on in charges to interconnectors. In addition, this approach will have the desirable collateral effect of easing the transition from a mandatory physical collocation to a mandatory virtual collocation environment. Specifically, if a LEC were to stop providing physical collocation, causing its expanded interconnection customers to shift to virtual collocation arrangements, an interconnector that currently uses terminating equipment in its collocated cage may offer to sell that equipment to the LEC at a price lower than that otherwise available to the LEC.

126. LECs may reasonably charge different rates to different customers if they incur different costs to serve those customers. To be sure, even virtual collocation offerings designed to meet the needs of individual interconnectors must be made generally available to all similarly situated interconnectors, and the actual rate levels (as well as the general methodology) must be specified in the tariffs. In this context, however, an interconnector that relies on the LEC to purchase equipment from a third party at a price the LEC negotiates is not similarly situated to, and may not pay the same charges as, an interconnector that offers to sell the equipment to the LEC itself at a

---

[214] See Special Access Expanded Interconnection Order, 7 FCC Rcd at 7428-29, ¶ 127; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7419, ¶ 79.

[215] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 6 FCC Rcd 4524, 4531 (1991).

[216] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7429, n.290; see Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 7 FCC Rcd 5235, 5236-37 (1992).

lower price. Because the costs prudently incurred by the LECs to serve the different interconnectors are different in such cases, the difference in the rates charged to different customers does not constitute unreasonable discrimination under Section 202 of the Communications Act.[217] The LEC, however, must use the same basic methodology specified in its tariff to compute all customers' rates.

127. We do not intend to limit the LECs' ability to use financial arrangements other than purchasing equipment outright from third parties. For instance, in their current virtual collocation tariffs, some LECs allow the interconnector to purchase equipment and lease it to the LEC. LECs may, if they wish, offer to purchase virtual collocation equipment from interconnectors for a nominal amount (e.g., $1) and make it available for resale to the interconnectors for the same amount. We decline, however, to adopt the CAPs' recommendation that we require the LECs to offer such an arrangement. Under our definition of virtual collocation, the LECs own and control the central office equipment. A $1 sale and repurchase right would effectively make the interconnector the owner of the equipment in all but formal title, and would perhaps run afoul of the D.C. Circuit's analysis in Bell Atlantic v. FCC.[218]

128. Overhead Costs. LECs incur overhead costs in providing expanded interconnection services, and should be allowed to charge reasonable amounts to recover these costs in their rates for these services. We are concerned, however, that the LECs could attempt to load excessive overhead costs on their connection charges. On the current record, we reaffirm our decision in the earlier orders in this proceeding that the LECs may include no more than uniform overhead loadings in their rates for expanded interconnection services, or must justify any deviations from uniform loadings.[219] In other words, LECs may not recover a greater share of overheads in rates for expanded interconnection services than they recover in rates for comparable services, absent justification. The LECs have the burden of demonstrating that their connection charges meet this overhead loading standard, and are otherwise just, reasonable, and not unreasonably discriminatory. The price cap LECs may be required to submit additional information to enable us to verify that the overhead loadings on the expanded interconnection connection charges do not unreasonably differ from the overhead loadings on other services, for which price cap LECs generally do not provide cost justification. We will carefully scrutinize the overhead costs that the LECs propose to recover through connection charges to ensure that they are reasonable.

129. Other Pricing Issues. We decline to require the LECs to set connection charges to ensure that interconnectors using virtual and physical collocation arrangements pay the same total prices, or to require that virtual collocation be priced using physical collocation rates as a starting point and deducting the cost savings from using a virtual arrangement, as requested by WilTel. Virtual collocation and physical collocation are different services, and each should be priced based on the cost of providing it. We reaffirm our decision to require the LECs to provide cost justification for any connection charges that would vary on a per circuit basis because of the number or type of interconnected circuits ordered.[220] We also reaffirm our conclusion that the LECs may not charge different rates for special access and switched interconnection rate elements, or for interconnection rate elements in different types of central offices (i.e., end offices, serving wire centers, tandem offices, etc.), unless costs differ.[221] Interconnectors' wage rates are irrelevant to a determination of the cost of the service provided by the LECs.

---

[217] 47 U.S.C. § 202. See Competitive Telecommunications Ass'n v. FCC, 998 F.2d 1058, 1062 (D.C. Cir. 1993), citing 1 Alfred E. Kahn, The Economics of Regulation: Principles and Institutions 63 (1970) (defining price discrimination as "charging different purchasers prices that differ by varying proportions from the respective marginal costs of serving them"); Sea-Land Service, Inc. v. ICC, 738 F.2d 311 (D.C. Cir. 1984) ("The core concern in the nondiscrimination area has been to maintain equality of pricing for shipments subject to substantially similar costs and competitive conditions, while permitting carriers to introduce differential pricing where dissimilarities in those key variables exist.").

[218] See Bell Atlantic v. FCC, slip op. at 9.

[219] See Special Access Expanded Interconnection Order, 7 FCC Rcd at 7429, ¶ 128 & n.291; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7419, ¶ 79.

[220] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7425, ¶ 121 n.269; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7419-20, ¶ 80.

[221] Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7419-20, ¶ 80.

C. Contribution Charge

130. Orders/Background. A "contribution charge" is a rate element that recovers subsidies or support flows embedded in LEC rates for services comparable to those provided by interconnectors. Certain states permit a contribution charge in connection with expanded interconnection, and we concluded in the Special Access Expanded Interconnection Order that in theory a contribution charge would be reasonable if targeted to recover specifically identified regulatory support mechanisms or non-cost-based allocations embedded in LEC rates subject to competition.[222] We did not, however, permit the LECs to assess an interstate special access contribution charge in the Special Access Expanded Interconnection Order. Instead, we took steps to eliminate the only support flow that appeared on the existing record to warrant a contribution charge. We did, however, adopt a rule (47 C.F.R. § 69.122) permitting the LECs to seek the Commission's approval for a contribution charge applicable to special access expanded interconnection, as well as to their own special access services, if they could demonstrate the existence of any such support flows.[223] In the Switched Transport Expanded Interconnection Order, we concluded that the transport interconnection charge recovers revenues not recovered through other transport rate elements, and therefore that there is no need for a separate switched transport contribution charge.[224]

131. Positions of the Parties on Reconsideration. MFS argues that individual LECs should not be allowed to seek permission to impose a contribution charge. Rather, it contends that contribution charges should be allowed only following a rulemaking proceeding, because any non-cost-based support flows that exist must exist for all LECs under the uniform access rate structure. MFS asserts that any changes in the cost allocation and pricing rules should be consistent across the LEC industry.[225] USTA responds that a LEC's own costs, not an industrywide proceeding, should define a cost-based contribution element.[226]

132. Discussion. We reaffirm the principle, adopted in the Special Access Expanded Interconnection Order, that interconnectors, as well as LECs, should provide contributions to support any specifically identified regulatory subsidy mechanisms that are embedded in LEC rates for services subject to competition.[227] This policy principle advances our universal service goals in a manner that is consistent with the development of access competition, by ensuring the continued recovery of any regulatory subsidies or support flows that clearly advance universal network access on an equitable basis.

133. Our rule on contribution charges for special access and expanded interconnection, 47 C.F.R. § 69.122, will advance this policy principle, under the new expanded interconnection regime adopted in this order. No contribution charge was permitted in the Special Access Expanded Interconnection Order because we proposed to eliminate the only regulatory support flow identified in the record affecting the LECs' interstate special access rates -- the over-allocation of General Support Facility costs. We eliminated that over-allocation shortly thereafter.[228] Without evidence of other regulatory support flows within interstate special access rates, we decline to modify for our new regulatory regime the policy principle, the rule, or our procedures regarding contribution charges. We believe that MFS's challenge is premature. If any LEC proposes a contribution charge, we will consider such a proposal on its merits. As to switched transport, we find no reason to alter our conclusion that the transport interconnection charge obviates the need for any separate contribution charge.

D. Separations

134. Orders/Background. In earlier stages of this proceeding, some parties argued that expanded interconnection should be accompanied by separations changes because interstate competition

---

[222] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7437, ¶ 146.

[223] Id., 7 FCC Rcd at 7436-39, ¶¶ 143-49.

[224] Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7421, ¶ 84.

[225] MFS Special Petition at 22.

[226] USTA Special Opposition at 5.

[227] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7436-39, ¶¶ 143-49.

[228] Amendment of the Part 69 Allocation of General Support Facility Costs, Report and Order, CC Docket No. 92-222, 8 FCC Rcd 3697 (1993), pets. for recon. pending.

could lead to revenue shifts to the intrastate jurisdiction.[229] We adopted no separations changes in the Special Access Expanded Interconnection Order and the Switched Transport Expanded Interconnection Order, because we found that any indirect cost reallocation that might result from the implementation of expanded interconnection would not be of sufficient magnitude to undermine universal service or threaten state regulatory programs.[230] Both orders were, however, accompanied by notices of proposed rulemaking that referred to the Federal-State Joint Board in CC Docket No. 80-286 the limited issue of whether separations changes are needed to allocate properly the costs of, and revenues from, expanded interconnection between the state and federal jurisdictions.[231]

135. Positions of the Parties on Reconsideration. NARUC submits that, pending Joint Board action, the LECs should be required to exclude from the separations process an amount of expense equivalent to the amount of revenues received for interstate expanded interconnection, to avoid cost-revenue mismatches.[232] The D.C. PSC argues that the Commission should have directed the Joint Board to consider the full impact of expanded interconnection on separations, such as the reassignment of formerly interstate special access facilities to the state jurisdiction caused by diversion of LEC interstate traffic to competitors. According to the D.C. PSC, this trend could accelerate the reduction in telephone subscribership in the District of Columbia by increasing the costs that must be recovered from intrastate services.[233] GTE responds that existing separations procedures should continue to be used, rather than the interim procedures proposed by the states, but argues that a comprehensive separations review is necessary.[234]

136. Discussion. We reaffirm our earlier conclusions concerning the possible need for separations changes in response to the adoption of expanded interconnection requirements for special access and switched transport.[235] The policies we adopt here create no reason to alter those conclusions. Thus, while we find no reason to delay implementation of the requirements set forth in this order, we leave in place our current referrals to the Joint Board concerning whether separations changes are needed to ensure a reasonable jurisdictional allocation of expanded interconnection costs and revenues.

137. Having reviewed the record on reconsideration, we decline to broaden the scope of our referral to the Joint Board. A comprehensive review of separations and cost recovery is not necessary to resolve the limited issue of the jurisdictional allocation of the costs of and revenues from expanded interconnection. We also decline to modify our separations procedures, as proposed by NARUC. Because the initial magnitude of expanded interconnection costs and revenues is likely to be very small relative to LECs' total regulated costs and revenues, we conclude that any effect of the existing rules on the overall separations allocations should be minimal and should permit ample time for the Joint Board to make a recommendation to the Commission.

---

[229] See Special Access Expanded Interconnection Order, 7 FCC Rcd at 7483-85, ¶¶ 242-46 and comments cited therein.

[230] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7485-86, ¶ 247; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7446-48, ¶¶ 147-51

[231] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7485-86, ¶¶ 247-48; Second Notice, 7 FCC Rcd at 7749, ¶¶ 54-55; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7446-48, ¶¶ 147-51.

[232] NARUC Special Petition at 22-23.

[233] D.C. PSC Special Petition at 1-5 (arguing that as competition develops and the LECs lose market share more rapidly with respect to interstate than intrastate services, a greater proportion of the LECs' facilities will be used for intrastate purposes, causing a greater proportion of costs to be allocated to the state jurisdiction).

[234] GTE Special Opposition at 22-23.

[235] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7485-86, ¶¶ 247-49; Second Notice, 7 FCC Rcd at 7749, ¶¶ 54-55; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7447-48, ¶¶ 150-51.

VII. LEC PRICING FLEXIBILITY

A. In General

138. Background/Orders. Before we adopted the expanded interconnection orders, the LECs were permitted to offer special access -- but not switched transport -- with term and volume discounts, and were required to offer all special and switched access services at geographically averaged rates in each study area. In the Special Access Expanded Interconnection Order, we permitted LECs with operational special access expanded interconnection arrangements in a study area to introduce density zone pricing for special access in that study area. We defined special access expanded interconnection as "operational" after at least one interconnector has taken a special access cross-connect element.[236] Density zone pricing is a system that permits the LECs gradually to deaverage their special access rates by zones in a study area. In the Switched Transport Expanded Interconnection Order, we permitted LECs with operational switched transport expanded interconnection arrangements in a study area to implement density zone pricing for switched transport in that study area. We also allowed the LECs to offer volume and term discounts on switched transport services after interconnectors have subscribed to a certain number of switched expanded interconnection cross-connects.[237]

139. The Teleport Petition. After the court issued its ruling in Bell Atlantic v. FCC, Teleport filed a petition for declaratory ruling requesting that the Commission eliminate the additional pricing flexibility granted to the LECs in the Special Access Expanded Interconnection Order unless those LECs voluntarily provide physical collocation for special and switched access expanded interconnection.[238] Teleport argues that the Commission determined that physical collocation is the best way to ensure that the LECs provide interconnection on the same terms as the interconnection they provide to themselves. Teleport further contends that the additional pricing flexibility granted to the LECs was premised on the mandate of physical collocation, and that without physical collocation, "the rationale behind the FCC's pricing flexibility standard falls away."[239] According to Teleport, limiting the availability of pricing flexibility will present a strong incentive for LECs to provide physical collocation, and an "appropriate reward" to those who do.[240] Finally, Teleport claims that if LECs continue to benefit from pricing flexibility without any incentive to provide physical collocation, the pace of developing competition will be slowed.

140. ALTS supports the Teleport petition, arguing that the policy and legal underpinnings of increased pricing flexibility were eliminated by the Court's decision in Bell Atlantic v. FCC. ALTS argues that the "significantly increased potential for competition made possible by expanded interconnection" will not be achieved without physical collocation.[241] Whereas Teleport's petition directly addresses only density zone pricing for special access, ALTS urges that Teleport's request is equally applicable to the pricing flexibility that the Commission has granted for switched transport. ALTS notes, however, that it is not arguing that there are no circumstances under which virtual collocation could create a level playing field. Rather, ALTS argues that a level playing field is more difficult to achieve where the only interconnection available is virtual collocation, and where the Commission's rules have not been modified to adequately ensure that virtual collocation is comparable in all relevant respects to physical.[242] Electric Lightwave, Inc. (ELI) also filed comments in support of the Teleport petition. ELI argues that virtual collocation is inferior to physical collocation, reduces the effectiveness of the Commission's expanded interconnection policies, and justifies a retraction of the previously granted pricing flexibility.[243]

---

236 Special Access Expanded Interconnection Order, 7 FCC Rcd at 7454, ¶ 179 n.411.

237 See generally Special Access Expanded Interconnection Order, 7 FCC Rcd at 7451-58, ¶¶ 172-86; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7422-36, ¶¶ 87-120. We describe how the density zone pricing system works, and the rules on volume and term discounts for switched transport, in more detail below.

238 Teleport Petition for Declaratory Ruling (filed June 10, 1994).

239 Id. at 4.

240 Id.

241 ALTS Comments on Teleport Petition at 3-4.

242 Id. at 5.

243 ELI Comments on Teleport Petition at 1-2.

141. Bell Atlantic, GTE, Pacific, SW Bell, and Ameritech oppose the Teleport petition. Some of these LECs argue that Teleport's request is premature and procedurally improper because the mandate in Bell Atlantic v. FCC has not yet issued.[244] The LECs assert that under the Commission's rules, density zone pricing is linked to any form of operational expanded interconnection cross-connect, not necessarily a physical collocation cross-connect.[245] They contend that Teleport's request would circumvent the effect of the Court's order by withholding the pricing flexibility that they assert they need to compete unless they allow third parties to occupy their property.[246] Some LECs submit that more pricing flexibility is needed, not less, given the growth of competition and the rigid limits on LEC pricing under the existing density zone pricing and switched transport discount rules.[247] Ameritech notes that CAPs' representatives have stated publicly that their ability to compete is not affected by the Bell Atlantic v. FCC decision.[248] Finally, SW Bell asserts that at least some LECs will likely choose to offer some form of expanded interconnection that is satisfactory to the Commission even after the Court's mandate issues, and that the Commission should look to what the LECs are actually offering, as opposed to what they are legally required to offer, in making decisions concerning pricing flexibility.[249] Sprint/United also opposes the petition. It renews its argument on reconsideration that density zone pricing should be permitted even if expanded interconnection is not operational, because it enables LECs to tailor prices more closely to costs, and thus creates correct economic signals that facilitate sound entry decisions by CAPs.[250]

142. Positions of the Parties on Reconsideration. Even under a general mandate of physical collocation, the CAPs have generally advocated reversal of the grant of additional pricing flexibility to the LECs. Teleport argues that special access expanded interconnection increased competition for only a limited market segment (for connections to IXC POPs, not for low density connections to end user premises), and that special access volume and term discounts already give the LECs the practical benefits of deaveraged rates.[251] MFS and ALTS maintain that the LECs have sufficient pricing flexibility for switched transport under the price cap rules, continue to control bottleneck facilities and dominate markets, and do not need additional flexibility (density zone pricing or volume and term discounts) to respond to competition before a more substantial amount of competitive entry has occurred.[252] They assert that no additional flexibility should be allowed until the Bureau completes its inquiry into special access volume and term discounts.[253] ALTS and Hyperion argue that the Commission should remove restrictions on the LECs in the same manner as it did for AT&T in the interexchange market -- gradually, and not until after competing providers had made substantial inroads in the market.[254]

143. The LECs contend that, in light of the competitive inroads of CAPs and others, and the likelihood of rapid competitive advances in the highly

---

[244] Pacific Opposition to Teleport Petition at 2-3; SW Bell Opposition to Teleport Petition at 1-2.

[245] GTE Opposition to Teleport Petition at 2-3; Pacific Opposition to Teleport Petition at 4; SW Bell Opposition to Teleport Petition at 2-3; Ameritech Reply in Support of Oppositions to Teleport Petition at 2. See also Sprint/United Opposition to Teleport Petition at 2 n.4.

[246] GTE Opposition to Teleport Petition at 1-2; Pacific Opposition to Teleport Petition at 3-4.

[247] Bell Atlantic Opposition to Teleport Petition at 1-5; Pacific Opposition to Teleport Petition at 4-7; Ameritech Reply in Support of Oppositions to Teleport Petition at 1-2.

[248] Ameritech Reply in Support of Oppositions to Teleport Petition at 2-3.

[249] SW Bell Opposition to Teleport Petition at 3-4.

[250] Sprint/United Opposition to Teleport Petition at 2-3. This filing represents the company's position both as LEC and as IXC.

[251] Teleport Special Petition at 15-17; Teleport Special Reply at 5-6.

[252] MFS Switched Petition at 4-10; MFS Switched Reply at 1-3; ALTS Switched Petition at 5-13; ALTS Switched Reply at 1-3.

[253] ALTS Special Petition at 22-23; MFS Switched Petition at 13-14.

[254] ALTS Switched Petition at 9-11; ALTS Switched Reply at 7-8; Hyperion Switched Petition at 8.

concentrated access market, additional pricing flexibility is needed to prevent price umbrellas or market share allocation that could deprive customers of the benefits of more rigorous competition.[255] Several LECs note that ALTS' and Hyperion's arguments that restrictions on LECs be maintained until they have lost a certain share of the market ignore the realities of the access market: a few large customers, high elasticity of supply and demand, and less potential overall market growth than the interexchange market.[256]

144. Discussion. We deny the Teleport petition and reject the claims for wholesale reversal of our density zone pricing policy, except that we slightly modify the threshold standard by changing the definition of when expanded interconnection is "operational," as set forth in ¶¶ 154-56 below.

145. We deny Teleport's request because the need for additional LEC pricing flexibility does not hinge upon the choice between virtual collocation and physical collocation. Access competition should accelerate with the implementation of expanded interconnection, whether in the form of virtual collocation or physical collocation. In adopting a mandatory virtual collocation policy, we intend to ensure the availability of a reasonable expanded interconnection offering that gives interconnectors a realistic opportunity to provide special access and switched transport services in competition with the LECs. Thus, making additional pricing flexibility available only to LECs that opt to provide physical collocation appears unwarranted.

146. As we stated in our earlier orders in this proceeding,[257] excessive constraints on LEC pricing and rate structure flexibility during a time of increasing competition will deprive customers of the benefits of competition and give the new entrants false economic signals. At the same time, we recognize that inadequate restrictions on LEC pricing and rate structure could permit competitive abuses that would stifle economic competitive entry and place excessive cost burdens on customers of less competitive services. We conclude that density zone pricing for special access and switched transport, as well as our switched transport discount rules, strike a reasonable balance between these competing concerns under our mandatory virtual collocation regime.

147. We reaffirm under the new regime our conclusion that retention of study-area-wide rate averaging or a flat restriction on discounted offerings could maintain LECs' prices at artificially high levels in low-cost areas and thus create a pricing umbrella for the CAPs, depriving customers of the benefits of more vigorous competition.[258] Restraining full competition by the LECs even when they are the low cost service providers could further deny consumers the benefits of reduced prices from competition, increase the LECs' competitive losses under expanded interconnection, and might cause LEC rates for less competitive services to rise. In addition, some parties might enter the market who would not do so if LEC service rates were permitted to reflect more economic pricing. Similarly, requiring the LECs to maintain below-cost prices for potentially competitive services in high-cost areas could depress LECs' incentives to invest in modernizing their networks, and could deter competitive entry. We will not, therefore, limit pricing flexibility in the manner that Teleport requests.

148. With regard to the issues raised on reconsideration, and the question of whether any

---

[255] USTA Special Opposition at 2-4; Bell Atlantic Special Opposition at 2-3 (submitting independent market analysis purporting to show that CAPs have already obtained 20-30% of market share in targeted areas); Rochester Special Opposition at 6-8; United Special Reply at 1-7 (stating that delaying LEC pricing flexibility will force AT&T, customer of 60% of access, to shift traffic from LECs to CAPs); USTA Special Reply at 1-2; Ameritech Switched Opposition at 3-4; BellSouth Switched Opposition at 2-6; NYNEX Switched Opposition at 4-6, 11-12 (noting that a large market share does not necessarily indicate market power, particularly in undesirable, regulated markets); United Switched Opposition at 2-3; USTA Second Special Reply at 1-3; GTE Switched Reply at 1-4; Rochester Switched Reply at 1-2. See also API Special Opposition at 9-10.

[256] See, e.g., Pacific Switched Opposition at 12-16, citing Special Access Expanded Interconnection Order, 7 FCC Rcd at 7422 n.253 (distinguishing the development of competition in the access and interexchange markets); USTA Switched Reply at 2.

[257] See generally Special Access Expanded Interconnection Order, 7 FCC Rcd at 7421-22, 7451-55, ¶¶ 110-15, 172-79; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7426-27, 7433-34, ¶¶ 98-100, 115-17.

[258] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7454, ¶ 178.

modifications to our previously adopted pricing flexibility rules is warranted under our new regime, we generally reaffirm our decisions in the expanded interconnection orders regarding LEC pricing flexibility. We address the specific issues relating to density zone pricing, volume and term discounts, and related issues raised in petitions for reconsideration at greater length below.

B. Density Zone Pricing

1. Threshold Required for Implementation

149. Orders/Background. In the Special Access Expanded Interconnection Order, we permitted LECs to introduce density zone pricing of interstate high-capacity special access in a study area after their expanded interconnection offerings are operational in that study area -- that is, once at least one interconnector has taken a special access cross-connect element.[259] In the Switched Transport Expanded Interconnection Order, we permitted LECs to implement density zone pricing of interstate switched transport in a study area once their expanded interconnection offerings are operational in that study area -- that is, after at least one interconnector has taken a switched cross-connect element.[260]

150. Positions of the Parties on Reconsideration. Several LECs argue that zone pricing should be available after expanded interconnection tariffs are effective, rather than after an interconnector takes the service, in order to enable LECs to set rates more in line with costs, and to avoid giving uneconomic incentives for entry.[261] Sprint and other IXCs maintain that zone pricing should be available regardless of whether expanded interconnection is operational, because zone pricing enables LECs to set rates closer to cost, facilitates sound network planning and decisionmaking by IXCs, and eliminates any justification for maintaining artificial DS3/DS1 rate ratios or uneconomic volume discounts.[262]

151. MFS and ALTS argue that instead of obtaining statewide pricing flexibility in response to a collocation arrangement, LECs should obtain pricing flexibility only in the specific metropolitan area where a CAP is providing competitive service using a collocation arrangement.[263] MFS proposes that density zone tariffs not be permitted to become effective until the earlier of: (1) 12 months after a party other than AT&T has an operational interconnection arrangement, or (2) when interconnection arrangements are operational in central offices that serve at least 25% of the total interstate special access circuits, weighted by capacity, in a geographic area.[264] MFS argues that since both density zone pricing and volume and term discounts give the LECs substantial pricing flexibility, LEC density zone pricing should not be permitted unless LEC volume discounts, including implicit volume discounts contained in DS3/DS1/voice grade relationships, are justified separately by cost conditions in specific zones.[265] The CAPs, MCI, and Ad Hoc oppose the LECs' request to engage in density zone pricing before an interconnector takes service, arguing that the existing requirement gives LECs an incentive to cooperate in implementing interconnection, that no CAP would commit "market suicide" by avoiding interconnection to prevent deaveraging, and that averaged prices do not give CAPs incorrect pricing signals because the CAPs take into account the

---

[259] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7454, ¶ 179 & n.411.

[260] Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7426-27, ¶ 99 & n.230.

[261] USTA Special Petition at 20-21; GTE Special Petition at 22-23; Rochester Special Petition at 15-17 (noting that two CAPs are providing service in competition with Rochester, but that neither has used Rochester's intrastate collocation offering); United Special Petition at 9-12; Ameritech Special Opposition at 17; GTE Special Opposition at 6; USTA Switched Petition at 4-5.

[262] Sprint Special Petition at 2-3; Sprint Special Opposition at 3-4; CompTel Special Opposition at 10-11; WilTel Special Opposition at 11; Sprint Switched Opposition at 1-3.

[263] ALTS Special Petition at 23; ALTS Switched Reply at 3-4 (terming geographic deaveraging a form of discrimination against customers in less dense service areas); MFS Special Petition at 23; MFS Switched Petition at 12-13.

[264] MFS Special Petition at 23-24.

[265] MFS Special Petition at 6; MFS Switched Petition at 11-12.

likelihood of later deaveraging.[266]

152. The LECs and Sprint oppose the delays in density zone pricing proposed by the CAPs, contending that density zone pricing merely allow rates to reflect cost differences, and that competition will begin even before, and certainly after, the first cross-connect is operational.[267] United asserts that the proposals of MFS and ALTS to allow LECs to lower rates in dense areas but not to bring prices in other zones closer to cost is unfair and essentially would force LECs to lose revenue.[268] United contends that MFS's solution to the perceived problem of AT&T's "headstart" -- restraining LEC flexibility when AT&T uses expanded interconnection, and permitting flexibility only when a party other than AT&T interconnects -- only exacerbates the problem and penalizes the LECs without restraining AT&T, because AT&T can and does compete with LECs in providing local transmission.[269]

153. Discussion. We reaffirm for our new regime the conclusion that LECs with "operational" expanded interconnection offerings for special access in a study area should be allowed to implement density zone pricing of special access in that study area, and similarly, that "operational" switched expanded interconnection should enable LECs to implement density zone pricing of switched transport.[270] Substantial changes in the LECs' expanded interconnection offerings are likely, however, in light of the Bell Atlantic v. FCC decision and the mandatory virtual collocation policy we adopt in this order. We believe it is important to reflect these changes. Accordingly, we modify our definition of when expanded interconnection offerings are "operational."

154. For the purpose of our mandatory virtual collocation regime, we define expanded interconnection offerings as "operational" when and if an interconnector has taken a cross-connect element in connection with a tariffed expanded interconnection offering after our new mandatory virtual collocation policy becomes effective. We believe that this change will give the LECs an incentive to cooperate in providing expanded interconnection pursuant to our new policy, and will ensure that expanded interconnection provided under the new rules gives interconnectors a realistic opportunity to compete with the LECs before we permit LECs to engage in density zone pricing. The fact that an interconnector took a cross-connect prior to implementation of the new rules will not qualify a LEC for density zone pricing if previous interconnectors cease taking expanded interconnection, and no new interconnector takes service after the mandatory virtual collocation rules are implemented.

155. Thus, an offering will be considered "operational" under our new regime in the following circumstances: (1) an interconnector has taken a cross-connect pursuant to a generally tariffed virtual collocation offering pursuant to our new rules; or (2) an interconnector has taken a cross-connect pursuant to a physical collocation offering subject to the terms of this order. In this second case, the interconnector need not have started taking the cross-connect after our new regime becomes effective, so long as it continues to take the cross-connect under the new rules. In study areas where a LEC has implemented density zone pricing, we will require the LEC to file, sixty days after the effective date of the LEC's new expanded interconnection offering, tariff revisions effective on 15 days notice that reestablish averaged rates throughout the study area pursuant to § 69.3(e)(7) of our rules if no interconnector has taken a cross-connect under our new regime.[271]

156. We reject proposals to delay any competitive rate changes by the LECs for an arbitrary time period (such as the 12 months proposed by MFS) or until after they have lost a specified

---

[266] ALTS Special Opposition at 9-10; MFS Special Opposition at 18-20; MCI Special Opposition at 5-6; Ad Hoc Special Opposition at 19-21.

[267] Ameritech Special Opposition at 17; GTE Special Opposition at 5-6; GTE Switched Reply at 4-5; United Special Opposition at 2-4, 6 (noting that it does not offer volume or term discounts on special access); Ameritech Switched Opposition at 3-4; Bell Atlantic Switched Opposition at 5; NYNEX Switched Opposition at 5; Pacific Switched Opposition at 16-18; United Switched Opposition at 2-3; Sprint Switched Opposition at 1-3.

[268] United Special Opposition at 2.

[269] United Special Opposition at 4-5.

[270] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7454, ¶ 179; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7426-27, ¶ 99.

[271] 47 C.F.R. § 69.3(e)(7).

proportion of market share. A threshold based on a simple percentage share of market penetration by LEC competitors comes too close to allocating market shares among competitors. We do not intend to try to determine competitive outcomes. Rather, we intend to expand opportunities for new entrants as well as incumbent providers to compete. As stated above, we will consider empirical evidence on the development of access competition in evaluating whether to grant the LECs additional pricing flexibility in the future.[272] We also reject the CAPs' suggestion that LECs be permitted to reduce rates in high-density areas but not to increase rates in low-density areas, where they may be below cost due to past geographic rate averaging. Finally, making density zone pricing for price cap LECs conditional on cost-justification of special access volume discounts would be inconsistent with price cap regulation. Under price cap regulation, the threshold justification for subsequent rate changes is tested primarily by reference to the indexes and bands of price cap regulation, not cost studies.

2. Price Cap Structure

157. Orders/Background. In earlier orders, the Commission created new price cap service subcategories for LEC offerings in different zones, within the existing service categories and subcategories. The zone subcategories have upper pricing bands of 5% and lower bands of 10%. In the year during which a LEC introduces density zone pricing, the LEC must apply the same upper and lower bands to all of the zone subcategories for a given service, but the rate levels may diverge to the extent permitted by the upper and lower bands without the justifications that the price cap rules require for above- or below-band rates.[273]

158. Positions of the Parties on Reconsideration. USTA submits that LECs will be unable to use the +5%/-10% pricing bands for the zones because of the interplay with the overall DS1 and DS3 subindexes. USTA also asserts that separate and overlapping DS1 and DS3 subindexes with duplicative zone subindexes are redundant and reduce price competition, and asks that the zone subindexes be widened and that other subindexes be eliminated.[274] USTA contends that the upper bands in the high-cost zone remove incentives to deliver service improvements because rates will be substantially below cost.[275] USTA asserts that the 90 day filing period and tariff support requirements for above band filings will deter and delay the implementation of compensatory rates in high cost areas. It argues for reducing the filing period and streamlining the cost support.[276] Specifically, USTA recommends modifying the tariff standard for above-band rate zone filings to include a showing that the proposed zone revenues, when aggregated, are no greater than the study area revenues before zone pricing was implemented.[277] Several other LECs also argue that the zone subindexes do not provide adequate pricing flexibility and are inconsistent with full competition and with the rationale behind the price cap system.[278]

159. United argues that broader annual pricing bands are needed, such as +20%/-20%, to enable LECs to move prices rapidly toward costs.[279] United also seeks clarification that the LECs may continue to average multiple study areas and to use a single tariff for multiple operating companies.[280] Sprint, CompTel, and WilTel argue that broader differences should be permitted for initial rates in different zones (i.e., set initial zone rates based on the costs of service in each zone), or broader bands such as -20% and +10% or +20% for subsequent rate changes, to enable LECs to set prices based on cost and to give proper access planning incentives to IXCs.[281] WilTel also

---

[272] See supra ¶ 79.

[273] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7456, ¶¶ 181-83; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7430-32, ¶¶ 109-112.

[274] USTA Special Petition at 18-20; USTA Special Reply at 3.

[275] USTA Switched Petition at 5.

[276] USTA Special Petition at 20.

[277] USTA Switched Petition at 5.

[278] GTE Special Petition at 20-21; Rochester Special Petition at 17-22; United Special Opposition at 7-8.

[279] United Special Petition at 12-13.

[280] Id. at 13-15.

[281] Sprint Special Petition at 3-6; Sprint Special Opposition at 4; Sprint Switched Petition at 3-5; Sprint Switched Opposition at 3-4; CompTel Special

agrees with some LECs' arguments that the zone-specific pricing subindexes eliminate the need for overall floors for DS3 and DS1 rates, and argues that the double layer of indexes could require a LEC to increase rates in low-density zones to offset a decrease in the high-density zone.[282]

160. The CAPs, MCI, WilTel, and Ad Hoc oppose LEC proposals to eliminate pricing bands or otherwise substantially broaden LEC pricing flexibility, contending that the price cap bands are necessary to protect against cross-subsidization of the LECs' competitive services by captive rural customers and to prevent abuse of the LECs' market power.[283] Ad Hoc does not oppose a reasonable increase in the LECs' downward pricing flexibility in contested markets, short of predation, but states that this right should not justify predation in monopoly markets.[284] MFS argues that if density zone pricing is allowed, LECs should have to demonstrate that the ratio of revenues to average variable cost in the highest-density zone is no less than that ratio in the lowest-density zone.[285]

161. The LECs respond that MFS's proposed rigid ratio requirement would restrict the LECs' ability to compete using cost-based prices, and would result in economic inefficiencies and umbrella pricing. They also argue that MFS's proposal could unfairly require LECs to lower prices throughout a study area, including in low-density areas where prices are already below cost, to compete with CAPs, and would essentially constitute a return to regulation based on fully distributed costs.[286] NYNEX contends that price cap regulation was developed to enable LECs to price services efficiently (i.e., services with elastic demand relatively close to marginal cost and services with inelastic demand relatively high above marginal cost), and to avoid the inefficient incentives created by cost-of-service regulation.[287] Rochester submits that subsidization only occurs when a company prices a service below incremental cost, for which average variable cost is a surrogate. Thus, Rochester asserts that MFS's concern would have merit only if the ratio of revenues to average variable cost were less than one in any particular zone, regardless of the relative ratios among zones. Rochester also argues that in a competitive market, profit margins can be expected to vary in different geographic areas.[288]

162. Discussion. We find no need to amend the price cap rules for density zone pricing under our mandatory virtual collocation regime. Moreover, we reaffirm our decisions regarding the price cap structure for density zone pricing under the pre-existing rules, including the +5%/-10% pricing bands that apply to the zone subindexes, the retention of the overall DS1 and DS3 pricing bands, and the existing tariff procedures for above-band rate changes. We continue to believe that we granted the LECs a reasonable degree of pricing flexibility with the density zone pricing system, and nothing in the record convinces us to the contrary. As we stated in the Special Access Expanded Interconnection Order, we intend to monitor the density zone pricing system carefully and to review it in 1995.[289] Measures to increase the LECs' pricing

---

Opposition at 12; WilTel Special Opposition at 11-12.

[282] WilTel Special Opposition at 12-13.

[283] ALTS Special Opposition at 10-11; MFS Special Opposition at 17-18; MCI Special Opposition at 7; Ad Hoc Special Opposition at 19-21; MFS Special Petition at 10-13; WilTel Switched Opposition at 5-6. But see United Special Reply at 4-5 (contending that density zone ends an urban-to-rural cross-subsidy, rather than creating one).

[284] Ad Hoc Special Opposition at 21.

[285] MFS Switched Petition at 12; MFS Switched Opposition at 3-4.

[286] USTA Switched Opposition at 5; GTE Switched Opposition at 11-12; NYNEX Switched Opposition at 7-11.

[287] NYNEX Switched Opposition at 3-7, citing National Rural Telecom Ass'n v. FCC, 988 F.2d 174, 182 (D.C. Cir. 1993) (upholding price cap regulation of LECs, and pointing out that it facilitates Ramsey pricing); see also infra ¶ 128 (LEC responses to similar arguments in context of volume and term discounts).

[288] Rochester Switched Opposition at 3, citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (subsidization occurs only in case of predatory pricing); Jay Foods, Inc. v. Frito-Lay, Inc., 614 F. Supp. 1073 (N.D. Ill. 1985) (rejecting geographic cross-subsidization argument and concluding that in a competitive market, profit margins can be expected to vary in different geographic areas); Rochester Switched Reply at 3.

flexibility may be appropriate in the future, however, as the access market grows more competitive.

163. We also decline to adopt MFS's reconsideration proposal to require the LECs to demonstrate that the ratio of revenues to average variable cost in the highest-density zone is no less than that ratio in the lowest-density zone. First, we believe that the problem about which MFS is concerned -- rates that are well in excess of costs in low-density zones -- is unlikely to occur in the near future. Evidence in the record indicates that the differences between the costs of serving different geographic areas are substantial, although the rates were averaged before the implementation of density zone pricing.[290] Thus, at present and for the next few years, we believe that with the limited pricing flexibility permitted the LECs, rates in low-density zones are unlikely to be substantially above cost. Second, we conclude that the rate-to-cost ratios may reasonably differ for similar services in different zones, within the limits of our price cap rules. When we adopted price cap regulation for the LECs, we explicitly recognized that deviations from fully distributed cost (embedded costs plus a proportional share of joint costs) may be desirable and in some cases can maximize the consumer welfare created by regulated carriers.[291] To protect against the LECs' ability to disadvantage one class of customers to the benefit of another, the Commission used the baskets and bands mechanisms of price cap regulation.

3. Definition of Zones

164. Orders/Background. In the Special Access Expanded Interconnection Order, the Commission directed LECs to assign central offices to zones based on cost based factors such as the density of total interstate special and switched traffic. Channel terminations or entrance facilities from a given central office are classified in the zone to which the office is assigned. Interoffice facilities between central offices in different zones are classified in the higher-priced, less dense of the zones, because the Commission concluded that "this classification will be consistent with traffic density patterns and underlying costs."[292] In the Switched Transport Expanded Interconnection Order, the Commission directed the LECs to use the same zone definitions for switched transport and special access.[293]

165. Positions of the Parties on Reconsideration. Several IXCs argue that the LECs should not use the same density pricing zones for special access and switched transport, or for entrance facilities and interoffice facilities. CompTel asserts that the zones created for channel terminations are unsuited for interoffice transport. CompTel argues that the zones developed for channel terminations, based on collection and dispersion of traffic at wire centers, lead to little or no Zone 1 interoffice transport in many states, while the costs of interoffice transport relate to the technologies of interoffice networks and should be grouped in zones with relatively large geographic areas.[294] WilTel submits that zones for interoffice special access and switched transport should be broad in geographic scope and should reflect prevailing network characteristics.[295] Sprint contends that the requirement that traffic between offices in different zones must be charged the higher-rated zone rates would result in virtually no interoffice switched transport carried at high-density rates. Accordingly, Sprint argues that density zone pricing of switched transport would be ineffective unless LECs are allowed to establish density zones for switched transport different from those for special access and are required

---

289 See Special Access Expanded Interconnection Order, 7 FCC Rcd at 7457, ¶ 184.

290 See Special Access Expanded Interconnection Order, 7 FCC Rcd at 7452, ¶ 175 & n.405 and evidence cited therein.

291 See National Rural Telecom Ass'n v. FCC, 988 F.2d 174, 182-83 (D.C. Cir. 1993) (affirming LEC price cap rules), citing Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Further Notice of Proposed Rulemaking, 3 FCC Rcd 3195, 3257-58 (1988); Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6810-11 & n.299 (1990), aff'd, National Rural Telecom Ass'n v. FCC, supra. See also Transport Rate Structure and Pricing, Second Report and Order, CC Docket No. 91-213, 9 FCC Rcd 615, 623, ¶ 15 (1994).

292 Special Access Expanded Interconnection Order, 7 FCC Rcd at 7455, ¶ 179 n.414.

293 Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7428-29, ¶ 104.

294 CompTel Switched Petition at 7-9; CompTel Switched Reply at 7-8.

295 WilTel Switched Petition at 7-8; WilTel Switched Reply at 5-7.

to rate interoffice traffic at the lower-priced zone, rather than the higher-priced zone.[296] ALTS asserts that in order to establish more than three zones, LECs should be required to satisfy the same standard that applies to above-band filings under price caps: a compelling showing of substantial cause, with a high likelihood of suspension.[297]

166. The LECs oppose establishing separate zone plans for switched and special access or for interoffice facilities and entrance facilities, and argue that their density zone pricing plans defined their zones based on a calculation that included special and switched volumes and interoffice and entrance facility volumes, that interoffice channels have cost characteristics similar to those of entrance facilities, and that separate plans would be illogical in view of the integrated services the LECs provide.[298]

167. Discussion. We reaffirm our decision to assign interoffice facilities between different zones to the higher-price, lower-density zone, and find no reason to apply a different rule under our mandatory virtual collocation policy. In the Special Access Expanded Interconnection Order, we reached our decision based on a conclusion that interoffice traffic between different zones has cost characteristics more similar to the traffic in the less dense zone. There is no basis in our policy on remand, and no new evidence in the reconsideration record, that would justify reversing this decision. We also decline to create separate zone systems for special access and switched transport services. This would be contrary to our conclusion in the Transport proceeding that special access and switched transport have similar cost characteristics.[299] Moreover, we directed the LECs to consider both special and switched access traffic in defining density zones.[300] Finally, we decline to create separate zone systems for interoffice facilities and entrance facilities, or to impose substantially higher burdens of proof than those we already imposed if LECs propose zone plans with more than three zones. These alternatives would be administratively burdensome and complex for the LECs, and do not appear to provide benefits that would justify the costs.

B. Volume and Term Discounts

1. Special Access

168. Order. In the Special Access Expanded Interconnection Order, we concluded that hubbing and ratcheting arrangements are reasonable means to give customers and LECs flexibility in structuring and engineering their special access arrangements. We also found that volume and term discounts are generally legitimate means of pricing special access services to recognize the efficiencies associated with larger traffic volumes and the certainty of longer-term arrangements. We stated, however, that some of the largest of the LECs' volume and term discounts raised concerns of anti-competitiveness, and we directed the Common Carrier Bureau to conduct an inquiry to help determine whether any additional guidelines might be appropriate.[301]

169. Positions of the Parties on Reconsideration. MFS asserts that the LECs should be required to cost-justify all volume and term discounts that exceed reasonable threshold levels, such as the 20% maximum volume discount and 10% maximum term discount that MFS had proposed.[302] MFS alleges that LEC volume and term discount practices will become even more pernicious if coupled with density zone pricing, and argues that LEC density zone pricing should not be permitted unless LECs justify their volume discounts, including implicit volume discounts contained in DS3/DS1/voice grade relationships,

---

[296] Sprint Switched Petition at 5-8; Sprint Switched Reply at 2-4. Accord, WilTel Switched Opposition at 5-6.

[297] ALTS Special Petition at 23.

[298] Bell Atlantic Switched Opposition at 4-6; BellSouth Switched Opposition at 7; GTE Switched Opposition at 10-11 (stating that the Commission should permit, but not require, individual LECs to establish separate zones).

[299] Transport Rate Structure and Pricing, CC Docket No. 91-213, Report and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 7006, 7028, 7034, ¶¶ 42, 53 (1992); Transport Rate Structure and Pricing, CC Docket No. 91-213, Second Report and Order, 9 FCC Rcd 615, 622, ¶ 12 (1994).

[300] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7455, ¶ 179 n.415.

[301] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7463, ¶¶ 199-200.

[302] MFS Special Petition at 4-6; MFS Special Reply at 2-4.

separately by cost conditions in specific zones.[303] MFS contends that it is unreasonable for LECs to charge less for unbundled, hubbed service offerings than they charge for bundled point-to-point circuits that in most cases use similar facilities, and asks that such hubbing discounts be addressed.[304] ALTS argues that the Commission should broaden the scope of the Bureau's inquiry to address all Tier 1 LEC volume discounts in excess of 20%, term discounts in excess of 10%, and hubbing arrangements.[305]

170. The LECs respond that the CAPs' arguments were considered previously and rejected by the Commission, suggest that the Commission obtain information about CAP volume and term discount practices, and assert that the volume and term discounts and hubbing arrangements are reasonable and have been cost-justified.[306] Sprint supports requiring the LECs to cost-justify volume discounts, and contends that there would be no justification for volume discounts in interoffice channel mileage rate elements.[307] Sprint contends that intermediate hubbing is reasonable, and serves as a critical tool for medium and small IXCs to mitigate in part the price advantages the current rate structure gives AT&T.[308]

171. Discussion. Pursuant to the Commission's direction, the Common Carrier Bureau conducted an inquiry into LEC special access volume and term arrangements. The Bureau required the four LECs that had been identified by MFS as offering the steepest discounts to submit cost data to demonstrate whether the rates for one of their most discounted offerings covered average variable cost and were otherwise just and reasonable. Certain CAPs and LECs submitted comments on these data.[309] At this time, we are not persuaded that LEC offerings are priced below their average variable cost. Nevertheless, we will continue to examine LEC pricing behavior in the future, and will be vigilant in examining any evidence of unreasonable pricing practices on the part of the LECs.

2. Switched Transport

a. In General

172. Positions of the Parties on Reconsideration. The IXCs other than AT&T generally seek reconsideration of the decision to permit volume discounts, arguing that such discounts will benefit AT&T, harm other IXCs, and interfere with the Commission's policies on the transport restructure and interexchange competition. CompTel, MCI, and WilTel contend that volume discounts on interoffice transport cannot be justified by underlying costs, because the cost of providing interoffice transport depends on the total traffic carried over the interoffice network, and all users should share the scale economies.[310] Sprint does not object to term discounts that are uniform regardless of the amount or type of capacity ordered, and concedes that cost-based volume discounts on entrance facilities should be permitted, but contends that volume discounts should not be permitted on interoffice facilities because the cost of such facilities is based on the total shared interoffice

---

[303] MFS Special Petition at 6.

[304] MFS Special Petition at 10-12; MFS Special Reply at 4-6.

[305] ALTS Special Petition at 15-17; ALTS Special Reply at 10.

[306] USTA Special Opposition at 7-8; Bell Atlantic Special Opposition at 3-4; GTE Special Opposition at 7-12; Rochester Special Opposition at 8-10; United Special Opposition at 14-15; USTA Special Reply at 4.

[307] Sprint Special Opposition at 4-5.

[308] Sprint Special Opposition at 6.

[309] See ALTS Ex Parte (Oct. 29, 1993); MFS Ex Parte (Dec. 31, 1992); MFS Ex Parte (Mar. 3, 1993); MFS Ex Parte (Mar. 30, 1993); MFS Ex Parte (July 19, 1993); MFS Ex Parte (Aug. 31, 1993); Teleport Ex Parte (Dec. 8, 1993); NYNEX Ex Parte (June 14, 1993); SW Bell Ex Parte (Apr. 30, 1993); SW Bell Ex Parte (May 11, 1993); SW Bell Ex Parte (Aug. 11, 1993); U S West Ex Parte (Aug. 12, 1993); U S West Ex Parte (Aug. 25, 1993).

[310] CompTel Switched Petition at 3-4; CompTel Switched Reply at 3-7; MCI Switched Petition at 1-2; MCI Switched Reply at 3-4; WilTel Switched Petition at 3-4 (citing Ameritech's Bulk Capacity Transport and Bell Atlantic's Facilities Management Service as LEC offerings that acknowledge interoffice network efficiencies), 5-6; WilTel Switched Opposition at 3-5; WilTel Switched Reply at 2-5.

network.[311]

173. The LECs and AT&T defend the Commission's decision to permit volume discounts, stating that the LECs' competitors and the small and medium IXCs offer volume discounts on interoffice facilities, and that although both DS1 and DS3 services use the same transport facilities, higher-capacity services use less costly electronics and involve administrative cost savings from ordering, billing, and provisioning.[312] BellSouth asserts that the small and medium IXCs' complaints are premature, because LEC-proposed discounts can be implemented only through a tariff filing with full cost support.[313]

174. Discussion. We reaffirm our decision to permit LECs to offer volume and term discounts on switched transport services after the specified threshold has been reached, and find no reason for a different rule under our mandatory virtual collocation policy. (We address below the specific threshold to be applied.) First, we are not persuaded that cost differences do not justify volume and term discounts on both interoffice facilities and entrance facilities. The cost of providing interoffice direct-trunked transport depends, at least in part, on the specific facilities used by the customer.[314] Transmission facilities carrying higher volumes of traffic tend to be characterized by lower per-circuit costs than lower-capacity facilities. In addition, term discounts recognize cost savings due to the certainty of longer-term commitments. When LECs first introduce such discounts on switched transport offerings, they will be required to provide cost justification because such discounts are new services under the price cap rules.

175. Second, the record reflects that volume and term discounts are an established and accepted feature of the communications marketplace. The LECs' competitors, as well as some of the IXCs that have argued against such discounts, offer these kinds of discounts themselves. If the LECs are not permitted to offer discounts on their services, large customers can simply obtain the services from other providers at such discounts, or provide such services for themselves.

176. Finally, we believe that permitting the LECs to offer volume and term discounts, subject to the safeguards we have adopted, will stimulate economic growth and enhance access to communications markets. Lower LEC prices for high-volume and long-term services, if cost-justified, should reduce access costs for IXCs, stimulate cost-based competition in the interexchange market, and ultimately make possible lower long-distance prices. Lower long-distance prices, in turn, should stimulate greater use of communications services, as well as free resources for consumers to spend and businesses to invest elsewhere in the economy, creating opportunities for new jobs and economic expansion. Lower long-distance prices should also give more Americans access to a variety of services that are available over interstate telecommunications facilities.

b. Threshold Required for Implementation

177. Order. In the Switched Transport Expanded Interconnection Order, we permitted the LECs to begin offering switched transport with volume and term discounts in any particular study area only after one of the following conditions is met: (1) 100 DS1-equivalent switched cross-connects are operational in the Zone 1 offices in the study area; or (2) an average of 25 DS1-equivalent switched cross-connects per Zone 1 office are operational. (Zone 1 refers to the LEC's density pricing zone with the greatest traffic density.) In study areas with no Zone 1 offices, the LECs may implement volume and term discounts once five DS1-equivalent switched cross-connects have been taken in the study area. LECs that have not implemented density zone pricing may implement volume and term discounts in a study area after customers have subscribed to 100 DS1-equivalent switched cross-connects in the study area.[315]

178. Positions of the Parties on

---

311 Sprint Switched Petition at 10-11; Sprint Switched Reply at 4-10.

312 Bell Atlantic Switched Opposition at 1-4; BellSouth Switched Opposition at 8-9; GTE Switched Opposition at 13-15; GTE Switched Reply at 7-8; Rochester Switched Reply at 5-6; USTA Switched Reply at 2-3; AT&T Switched Opposition at 8-10.

313 BellSouth Switched Opposition at 8.

314 See Transport Rate Structure and Pricing, CC Docket No. 91-213, Report and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 7006, 7030-32, ¶¶ 47-49 (1992).

315 Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7434-35, ¶ 118 & nn.263-65.

Reconsideration. The CAPs and the IXCs other than AT&T argue that the threshold constraints for allowing term and volume discounts are not valid measures of viable competition because they bear no relationship to realities of competition in the marketplace, the numbers are too small and easy to satisfy for large LECs, and the LECs already have excessive pricing flexibility. The CAPs recommend more stringent threshold tests for switched transport volume and term discounts: ALTS and Hyperion argue for thresholds based on a certain percentage of market share for competitors, while MFS proposes to permit LEC transport discounts in a study area only after an interconnector is present at central offices serving 50% of a LEC's switched access traffic in the study area, and two or more interconnectors are present in central offices serving 25% of the switched traffic in the study area.[316] Sprint contends that there is no need to require a particular level of competition before allowing cost-based discounts for entrance facilities, and it makes no economic sense to allow interoffice volume discounts even if viable competition is present.[317] MCI asserts that the thresholds are meaningless if the density of interconnection criteria can be satisfied by AT&T alone.[318]

179. The LECs oppose delays in volume and term discounts. They argue that their competitors provide such discounts and that because such delays would create a pricing umbrella and protections for LEC competitors that prevent real competition from developing, they are not in the public interest. They also assert that interconnection by AT&T is properly included in satisfying the threshold requirement, and argue that self-provisioning by AT&T represents a competitive challenge to LEC switched transport offerings as significant as the introduction of CAP networks.[319]

180. USTA and GTE assert that the threshold required for volume and term discounts on transport is inconsistent with the Commission's policy of permitting the LECs to offer special access discounts, which the Commission reaffirmed in the Special Access Expanded Interconnection Order, and is unsupported by the Communications Act. They contend that the threshold will unfairly exacerbate LEC competitive losses and prevent genuine competition, and is an arbitrary and capricious exercise in regulatory handicapping. They argue that a more reasonable threshold for volume and term discounts would be when switched expanded interconnection is tariffed (or, in the alternative, when it is operational).[320] USTA and GTE propose that special access cross-connects be counted toward satisfaction of the threshold requirement, given that special and switched access services are substitutable and zone plans were constructed based on total traffic density.[321]

181. GTE, Rochester, and USTA note that the threshold essentially requires substantial market share losses before LECs with smaller study areas may engage in volume and term discounts.[322] GTE asserts that in over half of its study areas, the 100

---

[316] ALTS Switched Petition at 12 (suggesting an "effective competition" standard under which (1) a certain percentage of telephone subscribers have access to at least one competitor to the LEC, and (2) a certain percentage of subscribers are receiving service from one of the competitors); ALTS Switched Opposition at 3-7; ALTS Switched Reply at 3-7; Hyperion Switched Petition at 3-9 (recommending competitive penetration of 20% of market as threshold); MFS Switched Petition at 15-16; CompTel Switched Petition at 4-5; MCI Switched Petition at 2-3; Sprint Switched Petition at 11-12; Sprint Switched Opposition at 4; WilTel Switched Petition at 4-5.

[317] Sprint Switched Petition at 12-13.

[318] MCI Switched Petition at 2-3.

[319] Ameritech Switched Opposition at 3-4; BellSouth Switched Opposition at 2-6; Bell Atlantic Switched Opposition at 1-4; Rochester Switched Petition at 4-6; USTA Switched Opposition at 2-4; NYNEX Switched Opposition at 5-6; Pacific Switched Opposition at 16-18; GTE Switched Opposition at 2-6, 8-9 (opposing MFS's proposed standard because competitive access markets are generally smaller than a study area, and opposing ALTS's proposed standard because numbers of subscribers is an inapposite measure in the access market, in which some subscribers have much higher levels of usage); GTE Switched Reply at 4-5.

[320] USTA Switched Petition at 6-9; GTE Switched Petition at 2-11.

[321] USTA Switched Petition at 9; GTE Switched Petition at 12; GTE Switched Opposition at 7-8; GTE Switched Reply at 6; accord, NYNEX Switched Opposition at 6 n.16.

[322] GTE Switched Petition at 9-11; GTE Switched Opposition at 6-7; Rochester Switched Petition at 4-8; USTA Switched Petition at 7-8.

DS1 equivalents threshold would require market share losses of 25% or more, and that in the five GTE study areas where the 25 DS1 equivalents per Zone 1 office threshold applies, that threshold amounts to a 43% to 60% loss of market share.[323] Rochester states that the 100 DS1 threshold, which applies to it, would require loss of nearly half of its switched transport minutes to competitors.[324] Sprint, MCI, MFS, and ALTS oppose the LECs' proposals, although these parties concede that the threshold may be unreasonably high in some smaller study areas.[325] As already noted, Sprint instead recommends permitting no volume discounts, MCI would permit only cost-based discounts that apply equally to all interoffice network users, while MFS recommends using a market penetration test as the threshold.

182. Discussion. For our new mandatory virtual collocation regime, we generally reaffirm the threshold that must be met before a LEC may introduce term and volume discounts on switched transport. The threshold chosen represents a considered policy decision balancing both the costs and benefits of higher and lower thresholds. The requirement that LECs not offer transport volume or term discounts until expanded interconnection is operational on a broader scale than a single operational cross-connect should provide an incentive for the LECs to offer expanded interconnection for switched transport on reasonable terms. In addition, a LEC's flexibility to engage in volume and term discounts for switched transport services should be linked to a demonstration that the LEC's switched expanded interconnection offering presents a viable competitive opportunity. For this reason, in light of our mandatory virtual collocation policy, we adopt the definition of "operational" cross-connects that we adopted in the context of density zone pricing.[326]

183. The lower thresholds for density zone pricing (and special access volume and term discounts) coupled with the higher threshold for switched transport discounts should gradually introduce LEC pricing flexibility and facilitate the initial development of competitive entry. A different standard for special access and switched transport is also reasonable: interstate switched access services, unlike special access services, have always been subject to close rate structure regulation and, until December 1993, were priced at an equal charge per minute of use. Permitting volume and term discounts for switched transport is a substantial departure from our past practice, and must be done cautiously.

184. As with density zone pricing,[327] we decline to set a threshold based on the market penetration of LEC competitors, an action that may be perceived to endorse allocating market shares among competitors. We do not intend to try to determine competitive outcomes. Rather, we intend to expand new entrants', as well as incumbent providers', opportunities to compete. We are, however, concerned about GTE's and Rochester's assertions that in smaller study areas the 100 DS1-equivalent switched cross-connects threshold requirement may require LECs to lose 25% to 60% of their switched transport market share before they may implement volume and term discounts. Because this problem potentially may affect only a few Tier 1 carriers with small study areas, we delegate authority to the Chief, Common Carrier Bureau, to modify the threshold point for zone density pricing in unusual circumstances where a change in the strict requirements would advance the Commission's objectives.

185. Finally, we do not adopt GTE's and USTA's proposal to count special access cross-connects toward any of the thresholds for switched transport discounts. Although there is a degree of cross-elasticity demand between special access and switched transport, the gradual introduction of LEC pricing flexibility warrants looking only to switched access cross-connects in deciding when to allow more switched access flexibility.

---

[323] GTE Switched Petition at 9-11; GTE Switched Opposition at 6-7; GTE Switched Reply at 5-6 (recommending amending the threshold to become the smaller of the existing threshold or 5% of the DS1 equivalents in the Zone 1 area).

[324] Rochester Switched Petition at 4-8; Rochester Switched Reply at 3-5.

[325] Sprint Switched Opposition at 4; MCI Switched Reply at 4-6; MFS Switched Opposition at 5; ALTS Switched Opposition at 3-7.

[326] See supra ¶¶ 154-55.

[327] See supra ¶ 156.

c. Application of New Service Test to Discounts

186. Order. When LECs subject to the price cap rules offer volume and term discounts on switched transport, the LECs must satisfy the cost showing requirements for new services under those rules. A special 120-day notice period, rather than the standard 45-day notice period, applies to these tariff filings.[328]

187. Positions of the Parties on Reconsideration. CompTel, Sprint, WilTel, and MFS object to the price cap new service test that will be used to evaluate the level of discounted prices. CompTel asserts that LECs have excessive flexibility to define direct costs and to employ non-uniform overhead loadings,[329] while Sprint contends that the Commission should require justification for any rate differences between different levels of capacity.[330] Sprint also argues that LECs should be required to implement density pricing before offering volume discounts, to prevent LECs from charging medium and small IXCs high, averaged rates for transport in high-density areas while giving AT&T volume discounts.[331] WilTel submits that the new service test is inadequate to scrutinize discounts because it prevents over-pricing but not discriminatory under-pricing.[332] WilTel opposes using the volume discounts in existing LEC special access tariffs as the basis for switched transport rates, noting that the Commission is in the process of investigating current LEC special access volume discounts.[333] MFS contends that the new service test does not place any meaningful limits on the magnitude of the discounts, and instead proposes requiring the LECs to show that the ratio of revenues to average variable cost of discounted services is not less than the same ratio for less discounted services (except for term discounts less than 10% or volume discounts less than 20%).[334]

188. NYNEX opposes proposals to compare the overhead loadings or revenue-to-cost ratios of different services. NYNEX argues that price cap regulation was developed to enable LECs to price services efficiently (i.e., services with elastic demand relatively close to marginal cost and services with inelastic demand relatively high above marginal cost), and to avoid the inefficient incentives created by cost-of-service regulation.[335] Rochester submits that subsidization only occurs when a company prices a service below incremental cost, for which average variable cost is a surrogate. Thus, Rochester asserts that MFS's concern would have force only if the ratio of revenues to average variable cost were less than one for any particular offering, regardless of the relative ratios among services.[336]

189. GTE argues that rates for discounted switched transport offerings should be presumed reasonable if based on existing special access rates, like rates for non-discounted, restructured transport, without additional cost support or lengthy review periods. GTE notes that its volume and term special access arrangements have been cost-justified either under rate-of-return regulation or under the price cap rules' below-band pricing test. GTE contends that discounted transport offerings are "new services" only as an artifact of the sequence in which the Commission permitted them to be introduced, and essentially are no more "new services" than were the non-discounted restructured transport rates.[337] GTE also argues that the 120-day tariff review period is unnecessarily long and

---

328 Special Access Expanded Interconnection Order, 8 FCC Rcd at 7435, ¶ 119.

329 CompTel Switched Petition at 5.

330 Sprint Switched Petition at 9-10; Sprint Switched Reply at 7.

331 Sprint Switched Petition at 10.

332 WilTel Switched Petition at 4.

333 WilTel Switched Opposition at 4.

334 MFS Switched Petition at 16-18.

335 NYNEX Switched Opposition at 3-7, citing National Rural Telecom Ass'n v. FCC, 988 F.2d 174, 182-83 (D.C. Cir. 1993) (upholding price cap regulation of LECs, and pointing out that it facilitates Ramsey pricing); see also supra ¶ 161 (LEC responses to similar arguments in context of density zone pricing).

336 Rochester Switched Opposition at 3, citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (subsidization occurs only in case of predatory pricing).

337 GTE Switched Petition at 13-16; GTE Switched Reply at 8-9. Accord, USTA Switched Reply at 3-4.

contrary to the public interest.[338] ALTS responds that improper pricing could be more disruptive for switched transport because of the size of the market, and that it is essential to retain the 120-day review period to give the Commission and interested parties additional time to assess whether the tariff rates are cost-justified.[339]

190. Discussion. We retain for our mandatory virtual collocation regime the rule regarding cost showings for discounted switched transport offerings, which qualify as new services under the price cap rules. New services are services that make additional options available to customers, which discounted transport offerings clearly do. Volume or term discounts for the transport component of interstate switched access have never been offered in the past. Contrary to the IXCs' assertions, the new service test protects against under-pricing as well as over-pricing. The cost justification that the LECs are required to submit enables us to ascertain that rates for new services are not less than direct costs.

191. We reject the proposals of MFS and Sprint to require LECs to demonstrate that discounted services recover the same proportion of overheads as non-discounted services, or to require that the ratio of revenues to average variable cost of discounted offerings be no less than that ratio for non-discounted services. We conclude that the cost showing required by the existing new service test adequately protects against possible unreasonable discrimination with respect to newly introduced volume and term discounts for switched transport.[340]

192. We believe that the cost justification required pursuant to the new service standard is an essential safeguard against the LECs' offering of unreasonable volume and term discounts on switched transport. Accordingly, we will not permit the discounted switched transport rates to be set based on pre-existing discounted special access rates without such cost justification. In addition, we are not persuaded that any change is necessary to the 120-day notice period for these tariff filings, which we conclude is reasonable in light of the extensive cost showings that must accompany these tariffs.

D. Other Forms of Pricing Flexibility

193. Orders/Background. In the Special Access Expanded Interconnection Order and the Switched Transport Expanded Interconnection Order, we did not grant the LECs broader pricing flexibility, such as individual case basis pricing of special access or switched transport in response to competitors' offerings or differential pricing of loop-side and trunk-side special access services.[341]

194. Positions of the Parties on Reconsideration. GTE and USTA argue that, in order to compete fully with CAPs, LECs should be able to engage in individual case basis contract pricing, competitive response pricing, or other alternatives.[342] USTA also argues for comprehensive reform of the restrictive Part 69 structure and tariffing rules applicable to the LECs in light of competition.[343] Ad Hoc supports non-predatory individual case basis pricing of DS1 and DS3 services in contested markets.[344] The CAPs and IXCs respond that such broad pricing flexibility could lead to widespread anti-competitive behavior by LECs, such as preferential arrangements benefiting AT&T, as demonstrated by the results of the Commission's investigation of individual case basis pricing of DS3 offerings and the pending inquiry on volume and term discounts, and is unnecessary given the flexibility already granted to the LECs.[345] Sprint contends that with a properly

---

[338] GTE Switched Petition at 16-17.

[339] ALTS Switched Opposition at 8.

[340] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 6 FCC Rcd 4524, 4531 (1991), recon., 7 FCC Rcd 5235, 5236-37 (1992) (adopting the current version of the new service test).

[341] Special Access Expanded Interconnection Order, 7 FCC Rcd at 7457-58, ¶¶ 185-86; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7424-25, ¶ 94.

[342] GTE Special Petition at 23-24; USTA Special Petition at 21; USTA Special Reply at 3-4.

[343] USTA Special Petition at 21-23.

[344] Ad Hoc Special Opposition at 21.

[345] ALTS Special Opposition at 11-12; MFS Special Opposition at 20-21; CompTel Special Opposition at 11-12; MCI Special Opposition at 7; WilTel Special Opposition at 7-10 (contending that such individual case basis pricing would interfere with

implemented system of density zone pricing that enables LECs to respond to competitive pressures in dense areas, there is no justification for individual case basis or contract pricing.[346] In an ex parte filing, Pacific argues that LECs should be permitted to institute differential rates for loop-side and trunk-side special access rates, which Pacific contends would be cost-justified.[347]

195. Discussion. We do not grant the LECs authority for broader pricing flexibility at present. We have taken a number of significant steps to increase the LECs' ability to compete with new entrants. We also recognize, however, that the LECs continue to possess substantial market power in the provision of special access and switched transport services. We believe that the ability to introduce density zone pricing and volume and term discounts under the criteria we have set is sufficient flexibility to facilitate the development of competition at this time.

196. As competition develops, we may consider eliminating more of the pricing restrictions imposed upon the LECs. As indicated in paragraph 79 above, however, we intend to carefully monitor the development of competition in the access marketplace, and have delegated to the Chief, Common Carrier Bureau, responsibility for instituting a monitoring program.

E. Fresh Look

197. Orders/Background. In general, "fresh look" means a policy that makes it easier for an incumbent provider's established customers to consider taking service from a new entrant. In the Second Reconsideration Order, we reconsidered de novo our "fresh look" policy for special access expanded interconnection. We concluded that certain long-term special access arrangements may prevent customers from obtaining the benefits of the new, more competitive access environment. For that reason, we adopted a "fresh look" policy, limiting the charges a LEC may impose on certain customers who want to terminate long-term LEC special access arrangements to an amount that would place both the LEC and the customer in the same position they would have been had the customer chosen a shorter term arrangement from the beginning of the term. We limited the fresh look opportunity to customers with LEC special access arrangements for terms of three years or longer, entered into on or before September 17, 1992, the date of adoption of the Special Access Expanded Interconnection Order. The right to limited termination charges for services in a particular central office exists for a period of 180 days from the date of filing of the LEC's tariff transmittal giving public notice of the start of the fresh look period. The LEC must file that tariff transmittal within five business days of the date that the first special access expanded interconnection arrangement is operational in that central office.

198. If a customer chooses to terminate a long-term arrangement pursuant to the fresh look policy, its termination liabilities will be limited to the difference between the amount the customer has already paid and any additional charges that the customer would have paid for service under a shorter term offering corresponding to the term actually used, plus interest at the IRS rate for tax refunds, compounded daily from the date of each discounted payment that the customer made while taking the service. In addition, we created a second fresh look opportunity that occurs when switched transport expanded interconnection becomes operational, and applies only to LEC special access facilities used to transmit both special and switched access traffic.[348] Like the original fresh look, this second opportunity applies only to long term arrangements entered into on or before September 17, 1992.

199. In Bell Atlantic v. FCC, the Court of Appeals did not directly address the LECs' challenges to our fresh look policy. The court held that "[a]lthough the temporary right to switch providers may have been intended as an independent regulatory remedy for the problems of rate structure and barriers to competition that the Commission identified, the remedy was tied to the details of co-location and would float unattached in their absence. We must therefore remand that portion as well."[349]

---

interexchange and access competition, and would violate the MFJ and § 202(a) of the Communications Act).

[346] Sprint Special Opposition at 5-6.

[347] Pacific Ex Parte (April 7, 1994), Attachment at 2-4.

[348] Second Reconsideration Order, 8 FCC Rcd at 7342-59, ¶¶ 3-41. See also Special Access Expanded Interconnection Order, 7 FCC Rcd at 7463-64, ¶ 201; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7437-38, ¶¶ 124-25.

[349] Bell Atlantic v. FCC, slip op. at 11.

200. Positions of the Parties on Reconsideration. MFS and Teleport argue that to facilitate greater access competition, the fresh look requirement should eliminate termination liabilities, rather than merely limiting them.[350] WilTel and MFS argue that AT&T's pre-existing collocation at many BOC central offices and its dominant market share enable it to benefit uniquely from expanded interconnection, assert that the benefits of fresh look will be lost if access customers do not have competitive alternatives to LEC services during the period in which they can terminate their access arrangements with LECs, and therefore ask that the fresh look period not be triggered by interconnection by a party that already had collocated facilities before September 1992 (i.e., AT&T) alone.[351]

201. The LECs respond that the CAPs and WilTel raise no new arguments, that the Commission's fresh look rules properly permit the LECs to collect cost-based non-recurring charges and put both the LEC and the customer in the same position they would have been if the customer had originally chosen a shorter term arrangement, and that customers with term arrangements are large sophisticated businesses that do not need additional protection.[352] They contend that LECs face real competition from self-provisioning by AT&T, that the expanded interconnection proceeding is not intended to equalize the competitive positions of new entrants and established providers, and that the fresh look period should run from the same date that density zone pricing is implemented.[353]

202. USTA suggests that, instead of requiring LECs to file tariff transmittals every time expanded interconnection becomes operational in a central office, the Commission should require LECs to file monthly transmittals to include all new collocations that become operational within that month.[354] MFS supports USTA's proposal, stating that it would reduce administrative burdens on LECs, interconnectors, and users by making the fresh look notice process simpler and more predictable.[355]

203. GTE Petition. GTE filed a petition for waiver of the requirement that it file a tariff each time expanded interconnection first becomes operational in a central office.[356] Instead, GTE proposes to reduce the termination charges in its tariff to enable all customers that may become eligible for the fresh look to exercise that option at any time during the term of their agreements. GTE also proposes not to charge customers any interest in computing the applicable termination charges. GTE contends that these measures would benefit its customers, and should relieve GTE of administrative burdens in calculating such charges. SW Bell does not oppose GTE's petition, but suggests that no waiver may be required, and contends that other LECs should not be subject to similar requirements.[357]

204. Discussion. We conclude that fresh look continues to be necessary, in connection with our mandatory virtual collocation policy, to give customers with LEC term discounts entered into on or before September 17, 1992, a reasonable chance to take advantage of new competitive opportunities made possible by expanded interconnection. We reaffirm our conclusion that the limited termination liabilities enable customers to benefit sooner from the competition generated by our expanded interconnection policies. We also reaffirm our conclusion that fresh look does not place an unreasonable burden on the LECs, since the LECs will obtain the compensation appropriate for the term actually taken by the customer. In addition, we find that the parties have presented no evidence or

---

[350] MFS Second Special Petition at 3-6; Teleport Switched Petition at 5-6.

[351] WilTel Second Special Petition at 2-3; WilTel Second Special Reply at 1-3; MFS Second Special Petition at 6-8; MFS Second Special Opposition at 1-3; MFS Switched Reply at 2 n.2.

[352] Ameritech Switched Opposition at 1-2; Bell Atlantic Second Special Opposition at 1-3; GTE Second Special Opposition at 2-5; United Switched Opposition at 4; Rochester Switched Opposition at 6; USTA Second Special Opposition at 2-3.

[353] GTE Second Special Opposition at 5-7; USTA Second Special Opposition at 3-5.

[354] USTA Second Special Petition at 1-2; USTA Switched Petition at 9-10; USTA Second Special Reply at 3; USTA Switched Reply at 5.

[355] MFS Switched Opposition at 6.

[356] GTE Petition for Limited Waiver of the "Fresh Look" Policy (Nov. 16, 1993).

[357] SW Bell Comments on GTE Petition for Limited Waiver of the "Fresh Look" Policy (DATE) at 3.

arguments in the reconsideration record that persuade us that our earlier conclusion regarding the maximum reasonable amount of termination liabilities was incorrect.

205. Some of the LECs challenged our fresh look policy in court on the grounds that we did not provide adequate notice of the policy to satisfy the requirements of Section 553 of the Administrative Procedure Act or Section 205 of the Communications Act.[358] We disagree with this contention. In the initial Notice of Proposed Rulemaking in this proceeding, we focused on the anticompetitive effect of the LECs' then-existing special access tariff structure.[359] Long-term contracts had the effect of locking in that tariff structure and sealing off portions of the market from competition, notwithstanding our expanded interconnection policy. Thus, in the absence of fresh look, implementation of expanded interconnection would lead to only limited special access competition because of the effects of long-term contracts. While we recognize that we did not ask for specific comment on the fresh look remedy, we continue to believe that it is a "logical outgrowth" of the competitive concerns identified in the Notice.[360] Finally, we reconsidered the fresh look issue de novo, and made substantial changes to the policy, in the Second Reconsideration Order, based on an extensive record submitted by a broad range of parties. Thus, even if inadequate notice was given before adopting fresh look in the Special Access Expanded Interconnection Order, any error was harmless because we have already reconsidered the decision de novo, with an open mind.[361]

206. We also reaffirm that interconnection by any party, including AT&T, in a given central office triggers the beginning of the fresh look period for that office. If AT&T (or any other party) interconnects in a central office, it should be eligible for limited termination liabilities for long-term LEC special access arrangements purchased by it or by its customers to whom it sells access service. The fresh look period does not re-commence each time a new interconnector enters a given central office. Interconnectors subsequent to the first must take the access market as they find it. The LEC tariff filing giving customers public notice of the beginning of the fresh look period for each central office gives potential subsequent interconnectors notice of the activities of the earliest interconnector, and enables them to start providing service in the central office during the fresh look period if they can and choose to do so. We are not placing any special restrictions on the ability of AT&T or other parties to purchase and use expanded interconnection.[362]

207. USTA's proposal to allow LECs to file monthly transmittals including all new collocations that become operational within that month appears to be reasonable. As noted by MFS in support, this should reduce the tariff filing burdens on LECs, as well as the information retrieval burdens on parties interested in these filings. Accordingly, we modify our fresh look policy, which currently requires LECs to file tariff transmittals giving public notice of the fresh look opportunity for each central office no later than five business days after the first special access expanded interconnection arrangement becomes operational in the central office. Instead, we will require the LECs to file tariff transmittals no later than five business days after the end of each calendar month giving public notice of the fresh look opportunity for each central office in which the first expanded interconnection arrangement became operational during that month. The fresh look period runs from the actual date that the first expanded interconnection arrangement becomes operational until 180 days following the filing date of the tariff providing

---

358 5 U.S.C. § 553; 47 U.S.C. § 205.

359 First Notice, 6 FCC Rcd at 3260, ¶¶ 6-9.

360 See Action Alliance of Senior Citizens of Philadelphia v. Bowen, 846 F.2d 1449, 1455 (D.C. Cir. 1988); Small Lead Refiner Phase-Down Task Force v. EPA, 705 F.2d 506, 547 (D.C. Cir. 1983); Central Lincoln Peoples' Utility District v. Johnson, 735 F.2d 1101, 1118 (9th Cir. 1984); American Transfer & Storage co. v. ICC, 719 F.2d 1283, 1303 (5th Cir. 1984); Second Reconsideration Order, 8 FCC Rcd at 7343-44, ¶¶ 6-8. See also First Notice, 6 FCC Rcd at 3266, ¶ 45 (requesting comment on "whether to establish new guidelines for review of rate structure responses to competition.").

361 See Reeder v. FCC, 865 F.2d 1298, 1304 (D.C. Cir. 1989); McLouth Steel Prods. Corp. v. Thomas, 838 F.2d 1317, 1323 (D.C. Cir. 1988); Air Transport Ass'n v. DOT, 900 F.2d 369, 379 (D.C. Cir. 1990), vacated for consideration of mootness, 111 S.Ct. 944 (1991).

362 See supra ¶¶ 109-110.

notice of the beginning of the fresh look period.[363] The same procedures will apply to fresh look periods triggered by switched transport expanded interconnection. In addition, we clarify that LECs need not file any tariff transmittals if their termination liabilities are less than or equal to the maximum liabilities specified by our fresh look policy. Accordingly, we dismiss GTE's petition for waiver as moot.

208. Finally, we conclude that no additional fresh look periods are necessary under our mandatory virtual collocation rules. Once interconnectors entered a market by using physical collocation arrangements in a particular central office, LEC customers with term discounts had the opportunity to switch their service to the interconnectors with limited termination liabilities. Such interconnectors are likely to remain active in the same geographic areas even if the LEC substitutes a virtual collocation offering for its physical collocation offering. Thus, if the fresh look period has already run in a given central office, no new fresh look period will be triggered by operational expanded interconnection under our new policies.

F. Non-Recurring Reconfiguration Charges

209. Order. In our earlier orders, we decided that all non-recurring charges applicable to customers shifting to an interconnector's services are to be set no higher than cost-based levels, and exempted such charges from the application of the presumption of reasonableness in the price cap rules. In addition, we concluded that any difference between the charges applicable when a customer shifts to an interconnector's services and those applicable when a customer reconfigures its service with the LEC must be cost-based.[364]

210. Positions of the Parties on Reconsideration. Ameritech asks the Commission to reconsider the decision to eliminate the price cap presumption of reasonableness for non-recurring reconfiguration charges, expressing concern about the erosion of pricing flexibility in the price cap system, and arguing that the price cap constraints and the existence of access competition and interconnection adequately protect consumers.[365] MFS responds that it is necessary to abandon the presumption of lawfulness in order to review the reasonableness of the levels and differences in non-recurring charges, protect consumers and competitors, and enforce the Communications Act's prohibition of unreasonable discrimination in this context.[366]

211. Teleport opposes the provision permitting "cost-based" differences between non-recurring charges applicable to customers shifting to use interconnector services and those applicable to customers reconfiguring LEC services. Teleport argues that this exception creates a huge loophole that enables LECs to discriminate against access competitors, and instead recommends a requirement that LECs waive all NRCs when customers shift traffic to competitors within 180 days of the establishment of a collocation arrangement in a given central office.[367] The LECs argue that termination liabilities are cost-based, are commonly used throughout commerce, including by the CAPs, and reflect the economics of protecting LECs and their ratepayers from premature customer departure from LEC facilities. They also argue that Teleport's proposal would constitute a rate prescription without the necessary procedures.[368]

212. Discussion. We reaffirm our policies on non-recurring reconfiguration charges. These charges raise special competitive concerns, and we conclude that elimination of the price cap presumption of reasonableness for these charges is necessary to enforce our requirement that the levels of and differences between these charges be cost-based, and to protect competitors and consumers. We also reaffirm that LECs may charge higher non-recurring charges to customers reconfiguring to use interconnectors' services than they charge for other

---

[363] See 47 C.F.R. § 1.4 (computation of time).

[364] Second Reconsideration Order, 8 FCC Rcd at 7361-63, ¶¶ 47-51; Switched Transport Expanded Interconnection Order, 8 FCC Rcd at 7439, ¶ 130.

[365] Ameritech Second Special Petition at 1-3; Ameritech Second Special Reply at 1-2 (noting that it has modified its non-recurring charges to establish a single rate structure applicable to special access, switched transport, and interconnection).

[366] MFS Second Special Opposition at 3-4.

[367] Teleport Switched Petition at 4-6.

[368] USTA Switched Opposition at 6; Ameritech Switched Opposition at 1-2; GTE Switched Opposition at 17-19; GTE Second Special Opposition at 2-5; United Switched Opposition at 4.

reconfigurations if such rate differences are cost-justified. The LECs incur legitimate costs in making service changes, and in general should be able to recover these costs from interconnectors and their customers. The only exception would be when the LEC does not recover non-recurring reconfiguration costs from its own special access or switched transport customers. In that case, the LEC must not charge customers who reconfigure in order to take service from an interconnector more than an amount reflecting the difference between the costs of the two different types of reconfigurations.

VIII. OTHER MATTERS

213. The CAPs have argued that the Commission should impose certain requirements to govern the transition from a mandatory physical to a mandatory virtual collocation regime. Specifically, the CAPs argue that in the event LECs choose to terminate their existing physical collocation offerings, those LECs should bear the full cost of any LEC-required rearrangements to virtual collocation.[369] The CAPs also argue that the LECs should reimburse interconnectors for certain charges previously paid for physical collocation, such as the costs of cage construction,[370] and that LECs that "grandfather" existing physical collocation arrangements should be required to permit interconnectors reasonably to expand those facilities to meet demand.[371] We believe that the transition issues raised by the CAPs generally present questions that should be addressed on a case-by-case basis. We delegate authority to the Chief, Common Carrier Bureau, to address these matters.

214. With respect to any other issues addressed in our previous expanded interconnection orders that are not specifically addressed in this order, we reaffirm our earlier conclusions for our new virtual collocation regime, based on the reasons stated in the earlier orders.

IX. CONCLUSION

215. Our expanded interconnection policy advances major Commission objectives of promoting economic growth and increasing access to communications networks. Accordingly, we modify that policy to be consistent with the recent court decision in the Bell Atlantic v. FCC case, and require the LECs to provide expanded interconnection through virtual collocation, unless they qualify for an exemption that would permit them to offer physical collocation instead. We have addressed in detail in this order the standards, terms, and conditions that will apply to virtual collocation under our new policy. Because we expect that some LECs will provide a Title II physical collocation offering under this new regime, we have also addressed the standards, terms, and conditions that will apply to physical collocation. In most respects, the rules governing the mandatory virtual collocation regime will be the same rules that applied under our original mandatory physical collocation policy.

X. ORDERING CLAUSES

216. Accordingly, IT IS ORDERED, pursuant to authority contained in Sections 1, 4, 201-205, 214, and 218 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 214, and 218, that Parts 64 and 69 of the Commission's Rules ARE AMENDED as set forth in Appendix B of this Order.

217. IT IS FURTHER ORDERED that the policies, rules, and requirements adopted in this Order SHALL BE EFFECTIVE on December 15, 1994, except the requirements regarding the filing of tariffs and regarding notifications with respect to exempt physical collocation offerings,[372] which SHALL BE EFFECTIVE on September 1, 1994.

218. IT IS FURTHER ORDERED that Teleport's Petition for Declaratory Ruling IS DENIED except to the extent specified in this order.

219. IT IS FURTHER ORDERED that GTE's Petition for Limited Waiver of the "Fresh Look" Policy IS DISMISSED as moot.

---

[369] MFS Ex Parte (July 5, 1994) at 23-24; U S Signal Ex Parte (July 7, 1994) at 3.

[370] ALTS Ex Parte (July 6, 1994) at 5; MFS Ex Parte (July 5, 1994) at 24-26.

[371] MFS Ex Parte (July 5, 1994) at 26-27.

[372] See supra ¶ 36.

220. IT IS FURTHER ORDERED that authority is delegated to the Chief, Common Carrier Bureau, as set forth herein.[373]

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

---

[373] See infra ¶¶ 61, 79, 81, 117, 184, & 213.

APPENDIX A
PETITIONS FOR RECONSIDERATION, OPPOSITIONS AND REPLIES FILED

Petitions for Reconsideration of the
Special Access Expanded Interconnection Order
("Special Petitions")
December 18, 1992[374]

American Telephone and Telegraph Co. (AT&T)
Association for Local Telecommunications Services (ALTS)
Central Telephone Co. (Centel)
GTE Service Corporation and its affiliated domestic telephone operating companies (GTE)
Independent Data Communications Manufacturers Association, Inc. (IDCMA)
MCI Telecommunications Corp. (MCI)
MFS Communications Co. (MFS)
National Association of Regulatory Utility Commissioners (NARUC)
New York Telephone Co. and New England Telephone and Telegraph Co. (NYNEX)
Penn Access Corporation (Penn Access)
Rochester Telephone Corp. (Rochester)
Sprint Communications Co. (Sprint)
Teleport Communications Group (Teleport)
Tennessee Public Service Commission (Tennessee)
United States Telephone Association (USTA)
United Telephone Companies (United)
WilTel, Inc. (WilTel)

Oppositions to Petitions for Reconsideration of the
Special Access Expanded Interconnection Order ("Special Oppositions")
February 3, 1993

Ad Hoc Telecommunications Users Committee (Ad Hoc)
Ameritech Operating Companies (Ameritech)
ALTS
American Petroleum Institute (API)
AT&T
Bell Atlantic Telephone Companies (Bell Atlantic)
Competitive Telecommunications Association (CompTel)
GTE
IDCMA
Information Industry Association (IIA)
Information Technology Association of America (ITAA)
International Communications Association (ICA)
MCI
MFS
NARUC
NYNEX
Prodigy Services Co. (Prodigy)
Rochester
Sprint
United
USTA
WilTel

[374] GTE filed a document captioned "Second Petition for Reconsideration" on February 1, 1993. This filing does not challenge the First Reconsideration Order; in substance it merely records GTE's continued objections to the Special Access Expanded Interconnection Order discussed in its initial petition for reconsideration. We consider this "petition" as an ex parte filing.

Replies to Oppositions to Petitions for Reconsideration of the
Special Access Expanded Interconnection Order ("Special Replies")
February 18, 1993

ALTS	MFS	Penn Access Corp.	United
AT&T	IDCMA	(Penn Access)	USTA
GTE	NYNEX	Sprint	WilTel
MCI		Teleport	

Petitions for Reconsideration of the
Second Reconsideration Order ("Second Special Petitions")
October 18, 1993

Ameritech	MFS	USTA	WilTel

Oppositions to Petitions for Reconsideration of the
Second Reconsideration Order ("Second Special Oppositions")
November 23, 1993

Bell Atlantic	GTE	MFS	USTA

Replies to Oppositions to Petitions for Reconsideration of the
Second Reconsideration Order ("Second Special Replies")
December 9, 1993

Ameritech	MFS	USTA	WilTel

Petitions for Reconsideration of the
Switched Transport Expanded Interconnection Order ("Switched Petitions")
October 18, 1993

ALTS	Pennsylvania Public Utility Commission
CompTel	(Pennsylvania)
GTE	Sprint
Hyperion Telecommunications, Inc. (Hyperion)	WilTel
MCI	Teleport
MFS	USTA
NARUC	

Oppositions to Petitions for Reconsideration of the
Switched Transport Expanded Interconnection Order ("Switched Opppositions")
November 23, 1993

Ameritech	NYNEX
AT&T	Pacific Bell and Nevada Bell (Pacific)
Bell Atlantic	Rochester
BellSouth Telecommunications, Inc. (BellSouth)	Sprint
GTE	United and Central Telephone Companies (United)
MFS	USTA
	WilTel

Replies to Oppositions to Petitions for Reconsideration of the
Switched Transport Expanded Interconnection Order ("Switched Replies")
December 9, 1993

CompTel	MCI	Rochester	USTA
GTE	MFS	Sprint	WilTel

APPENDIX B -- RULE CHANGES

PART 64 -- MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for Part 64 continues to read as follows:

AUTHORITY: Section 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 218, 225, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201, 218, 225, unless otherwise noted.

2. Section 64.1401 of Subpart N of Part 64 is amended by revising paragraph (c), removing paragraphs (d) and (e), redesignating paragraphs (f) through (i) as paragraphs (d) through (g), respectively, and revising redesignated paragraph (f)(2), to read as follows:

§ 64.1401 Expanded Interconnection

* * * * *

(c) The local exchange carriers specified in paragraph (a) of this section shall offer expanded interconnection for interstate special access and switched transport services through virtual collocation, except that they may offer physical collocation, instead of virtual collocation, in specific central offices, as a service subject to non-streamlined communications common carrier regulation under Title II of the Communications Act (47 U.S.C. §§ 201-228).

* * * * *

(f) * * *

(2) At least two such interconnection points at any local exchange carrier location at which there are at least two entry points for the local exchange carrier's cable facilities, and space is available for new facilities in at least two of those entry points.

Part 69 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 69 -- ACCESS CHARGES

1. The authority citation for Part 69 continues to read as follows:

AUTHORITY: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1070, 1072, 1077, 1094, as amended; 47 USC 154, 201, 202, 203, 205, 218, 403.

2. Section 69.121 is amended by revising paragraph (a)(2) to read as follows:

§ 69.121 Connection charges for expanded interconnection.

(a) * * *

(2) Charges for subelements associated with physical collocation or virtual collocation, other than the subelement described in paragraph (a)(1) of this section and subelements recovering the cost of the virtual collocation equipment described in § 64.1401(e)(1) of this chapter, may reasonably differ in different central offices, notwithstanding § 69.3(e)(7).

* * * * *

Separate Statement

of

Commissioner James H. Quello

Re: Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141

I support this Memorandum Opinion and Order because I have consistently supported this Commission's pro-competitive policy of expanded interconnection. The benefits of allowing competitive provision of communications access services are manifest in the record before this Commission and redound to the benefit of American consumers. It was not the policy per se that was vacated on appeal, but, instead, the procedure by which we chose to implement the broader policy objectives. Although the interstices may have been deemed impermissible, the corpus remains sound.

While it is true that I had some reservations about mandating physical collocation, I do not believe that virtual collocation suffers the same flaws. The businesses affected by this decision, LECs, IXCs, and CAPs alike, need a reasonable and predictable regulatory regime. Predictability engenders rational business planning and decision making, which is in the ultimate interest of the public. I believe that virtual collocation meets these criteria and is a sound regulatory mechanism.

Moreover, this Commission is acting expeditiously to preserve such predictability by seeking to avoid a gap in regulatory continuity that would result if the expanded interconnection policy were to lapse before the new virtual collocation tariffs were in place. This Memorandum Opinion and Order provides guidance to all parties during the transition from physical to virtual collocation.

I am convinced that this Commission has, and is properly exercising, the statutory authority to mandate virtual collocation but am also pleased that this Memorandum Opinion and Order allows for flexibility. The local telephone companies are permitted to retain physical collocation or suggest other means of providing expanded interconnection. In my view, the proper balance between regulatory oversight and business practice has been restored by returning this decision to the carriers.

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Expanded Interconnection with Local Telephone Company Facilities, Memorandum Opinion and Order (CC Docket No. 91-141)

In this Memorandum Opinion and Order, the Commission responds to a decision of U.S. Court of Appeals for the District of Columbia Circuit, which vacated and remanded the Commission's order on expanded interconnection on the grounds that the Commission does not have authority to require local exchange carriers (LECs) to provide expanded interconnection through physical collocation.[1] This Memorandum Opinion and Order mandates that LECs offer expanded interconnection in the form of virtual collocation. As of September 1, 1994, Tier I LECs (other than NECA pool members) must file generally available tariffs, offering expanded interconnection through virtual collocation. LECs will be exempted from this requirement in central offices where they agree to provide physical collocation subject to the Order's policies.

I have previously supported the Commission's policies on expanded interconnection as steps toward increased competition in local and interstate access services.[2] On remand, I support our efforts to implement expanded interconnection rules that will expand service choices for telecommunications users, and heighten the incentives for efficient and flexible pricing by existing carriers. Our expanded interconnection rules are necessary to the development of a competitive local exchange access structure, through competing access providers (CAPs) and other interconnectors. As a result, I support this action by the Commission to implement virtual collocation rules which will continue to promote competition through flexible interconnection arrangements, and provide a measure of certainty to interconnectors seeking to provide interstate access services.

I am also concerned that the Commission balance its interconnection policy by providing sufficient flexibility to the LECs in conjunction with virtual collocation interconnection requirements. In particular, I am concerned that the provisions regarding the designation of equipment by the CAPs properly balance the need to allow LEC's to manage and control their network operations, while satisfying interconnection requests under virtual collocation tariffs. In this regard, I believe that potential CAP demand for interconnection from the LECs is likely to involve a reasonable number of requests in the vast majority of situations. The provisions adopted for virtual collocation are likely to impose fewer burdens on the LECs in terms of central

---

[1] Bell Atlantic Telephone Companies v. FCC, No. 92-1619 (D.C. Cir., June 10, 1994) (vacating in part and remanding certain orders in the Expanded Interconnection proceeding, CC Docket No. 91-141).

[2] See Separate Statement of Commissioner C. Barrett, September 17, 1992, CC Doctet No. 91-141.

office space in comparison to requirements for physical collocation. This Order creates a process for interconnectors to designate specific equipment for inclusion in the LECs' initial tariff filings. This initial tariff requirement will provide LECs some measure of certainty in terms of the types of equipment that interconnectors are likely to use. Further, in the limited instances where the LECs receive interconnection requests that cannot be satisfied within the limitations of their technical network operations or central office configurations, they can seek a good cause waiver from virtual interconnection compliance in such cases.[3] Given our strong concerns for balancing competitive market arrangements with reasonable LEC interconnection requirements, this Order achieves such a result. The burden to prove that certain virtual collocation arrangements may not be feasible is properly placed upon the LEC--the entity with the most knowledge of the technical configuration of its network and central offices.

Other options for virtual collocation that impose fewer conditions on the LECs might not offer the necessary certainty for interconnectors in order to avoid disruptions in competition. Thus, I support this decision as a means of promoting the public policy goals of competition through interconnection while avoiding the legal concerns associated with physical collocation.

[3] The Commission may consider alternative interconnection arrangements proposed by telephone companies in waiver petitions if those proposals satisfy the public interest objectives adopted in this Order.

SEPARATE STATEMENT OF

COMMISSIONER RACHELLE B. CHONG

Re: Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141

Today we revise our expanded interconnection policy in response to a recent judicial decision reviewing the mandatory physical collocation requirement we adopted in previous orders in this docket.[1] Our modified expanded interconnection rules require local exchange carriers ("LECs") to offer virtual collocation to prospective interconnectors, with an exemption from this requirement for any LEC that opts to provide physical collocation on a common carrier basis in lieu of a virtual collocation offering.

I support this revised approach because it advances three important objectives: (1) increased competition; (2) regulatory certainty; and (3) enhanced flexibility. First, by providing competitive access providers, interexchange carriers and users an opportunity to interconnect their transmission facilities to those of the LECs, we further the Commission's overarching goal to foster more competition in the interstate special access and switched transport markets. This increased competition should lead to lower prices for communications services and greater choices for consumers.

Second, by acting swiftly and decisively, we seek to bring certainty to a regulatory environment that was left somewhat uncertain in the wake of the court's decision. Our action today seeks to avoid any lapse in our expanded interconnection policy and should provide guidance to LECs and interconnectors with respect to their rights and obligations under our revised rules.

Third, I am pleased that our revised approach affords a measure of flexibility for both LECs and interconnectors. Most importantly, the fundamental decision whether to provide virtual collocation or to opt for physical collocation offered on a common carrier basis is within the discretion of the LECs. This is a choice that was not available to LECs under the mandatory physical collocation rule reviewed by the court. We also have provided for choices in the installation, maintenance and repair of equipment necessary to implement interconnection in order to address concerns expressed to us by the affected parties. Under our revised approach, a local exchange carrier may authorize the technical representatives of an interconnector to install, maintain and repair designated equipment in the LEC's central office. This procedure in some instances will obviate the need for a local exchange carrier to engage in costly training of its employees to install, maintain and repair various types of equipment with which they may be unfamiliar. It also may enable an interconnector to avoid paying for such costly training of LEC employees. Further, should the local exchange carrier

---

[1] See Bell Atlantic Telephone Companies v. FCC, No. 92-1619 (D.C. Cir. June 10, 1994).

choose to utilize an interconnector's technicians to perform these service functions, the interconnector will be afforded a greater measure of security with respect to installation, maintenance and repair of critical equipment on a timely basis.

Finally, I encourage the LECs and interconnectors to work with each other and with the Commission to achieve a smooth transition to our revised expanded interconnection regime. Clearly, the potential exists for conflicts to arise between LECs and interconnectors as we move toward a more competitive interstate access environment. When disputes arise concerning particular interconnection arrangements, I urge the parties to consider employing consensual dispute resolution methods such as mediation to resolve their differences. In this regard, I support the delegation of authority to the Chief of the Common Carrier Bureau to develop alternative dispute resolution techniques to address conflicts that may arise in this context.

# # # # #

1.0
1.1
1.25
1.4
1.6
1.8
2.0
2.2
2.5
2.8
3.2
3.6
4.0
4.5
5.0
5.6
6.3
7.1
8.0
9.0
10.0